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VOLUME 387

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1966

MAY 15 THROUGH JUNE 5, 1967

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

EARL WARREN, Chief Justice.
HUGO L. BLACK, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
TOM C. CLARK, Associate Justice.
JOHN M. HARLAN, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
ABE FORTAS, Associate Justice.

RETIRED.

STANLEY REED, Associate Justice.

RAMSEY CLARK, Attorney General.
THURGOOD MARSHALL, Solicitor General.
JOHN F. DAVIS, Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
T. PERRY LIPPITT, Marshal.
HENRY CHARLES HALLAM, Jr., Librarian.

381886

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES.

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, viz.:

For the District of Columbia Circuit, EARL WARREN, Chief Justice.

For the First Circuit, ABE FORTAS, Associate Justice.

For the Second Circuit, JOHN M. HARLAN, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, EARL WARREN, Chief Justice.

For the Fifth Circuit, HUGO L. BLACK, Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, TOM C. CLARK, Associate Justice.

For the Eighth Circuit, BYRON R. WHITE, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

October 11, 1965.

(For next previous allotment, see 371 U. S., p. v.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1966.

IN RE GAULT ET AL.

APPEAL FROM THE SUPREME COURT OF ARIZONA.

No. 116. Argued December 6, 1966.—Decided May 15, 1967.

Appellants' 15-year-old son, Gerald Gault, was taken into custody as the result of a complaint that he had made lewd telephone calls. After hearings before a juvenile court judge, Gerald was ordered committed to the State Industrial School as a juvenile delinquent until he should reach majority. Appellants brought a habeas corpus action in the state courts to challenge the constitutionality of the Arizona Juvenile Code and the procedure actually used in Gerald's case, on the ground of denial of various procedural due process rights. The State Supreme Court affirmed dismissal of the writ. Agreeing that the constitutional guarantee of due process applies to proceedings in which juveniles are charged as delinquents, the court held that the Arizona Juvenile Code impliedly includes the requirements of due process in delinquency proceedings, and that such due process requirements were not offended by the procedure leading to Gerald's commitment. *Held:*

1. *Kent* v. *United States*, 383 U. S. 541, 562 (1966), held "that the [waiver] hearing must measure up to the essentials of due process and fair treatment." This view is reiterated, here in connection with a juvenile court adjudication of "delinquency," as a requirement which is part of the Due Process Clause of the Fourteenth Amendment of our Constitution. The holding in this case relates only to the adjudicatory stage of the juvenile process, where commitment to a state institution may follow. When proceedings may result in incarceration in an institution of

confinement, "it would be extraordinary if our Constitution did not require the procedural regularity and exercise of care implied in the phrase 'due process.'" Pp. 12–31.

2. Due process requires, in such proceedings, that adequate written notice be afforded the child and his parents or guardian. Such notice must inform them "of the specific issues that they must meet" and must be given "at the earliest practicable time, and in any event sufficiently in advance of the hearing to permit preparation." Notice here was neither timely nor adequately specific, nor was there waiver of the right to constitutionally adequate notice. Pp. 31–34.

3. In such proceedings the child and his parents must be advised of their right to be represented by counsel and, if they are unable to afford counsel, that counsel will be appointed to represent the child. Mrs. Gault's statement at the habeas corpus hearing that she had known she could employ counsel, is not "an 'intentional relinquishment or abandonment' of a fully known right." Pp. 34–42.

4. The constitutional privilege against self-incrimination is applicable in such proceedings: "an admission by the juvenile may [not] be used against him in the absence of clear and unequivocal evidence that the admission was made with knowledge that he was not obliged to speak and would not be penalized for remaining silent." "[T]he availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites. . . . [J]uvenile proceedings to determine 'delinquency,' which may lead to commitment to a state institution, must be regarded as 'criminal' for purposes of the privilege against self-incrimination." Furthermore, experience has shown that "admissions and confessions by juveniles require special caution" as to their reliability and voluntariness, and "[i]t would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children." "[S]pecial problems may arise with respect to waiver of the privilege by or on behalf of children, and . . . there may well be some differences in technique—but not in principle—depending upon the age of the child and the presence and competence of parents. . . . If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary. . . ." Gerald's admissions did not

measure up to these standards, and could not properly be used as a basis for the judgment against him. Pp. 44–56.

5. Absent a valid confession, a juvenile in such proceedings must be afforded the rights of confrontation and sworn testimony of witnesses available for cross-examination. Pp. 56–57.

6. Other questions raised by appellants, including the absence of provision for appellate review of a delinquency adjudication, and a transcript of the proceedings, are not ruled upon. Pp. 57–58.

99 Ariz. 181, 407 P. 2d 760, reversed and remanded.

Norman Dorsen argued the cause for appellants. With him on the brief were *Melvin L. Wulf, Amelia D. Lewis* and *Daniel A. Rezneck.*

Frank A. Parks, Assistant Attorney General of Arizona, argued the cause for appellee, *pro hac vice,* by special leave of Court. With him on the brief was *Darrell F. Smith,* Attorney General.

Merritt W. Green argued the cause for the Ohio Association of Juvenile Court Judges, as *amicus curiae,* urging affirmance. With him on the brief was *Leo G. Chimo.*

The Kansas Association of Probate and Juvenile Judges joined the appellee's brief and the brief of the Ohio Association of Juvenile Court Judges.

Briefs of *amici curiae,* urging reversal, were filed by *L. Michael Getty, James J. Doherty* and *Marshall J. Hartman* for the National Legal Aid and Defender Association, and by *Edward Q. Carr, Jr.,* and *Nanette Dembitz* for the Legal Aid Society and Citizens' Committee for Children of New York, Inc.

Nicholas N. Kittrie filed a brief for the American Parents Committee, as *amicus curiae.*

MR. JUSTICE FORTAS delivered the opinion of the Court.

This is an appeal under 28 U. S. C. § 1257 (2) from a judgment of the Supreme Court of Arizona affirming the

dismissal of a petition for a writ of habeas corpus. 99 Ariz. 181, 407 P. 2d 760 (1965). The petition sought the release of Gerald Francis Gault, appellants' 15-year-old son, who had been committed as a juvenile delinquent to the State Industrial School by the Juvenile Court of Gila County, Arizona. The Supreme Court of Arizona affirmed dismissal of the writ against various arguments which included an attack upon the constitutionality of the Arizona Juvenile Code because of its alleged denial of procedural due process rights to juveniles charged with being "delinquents." The court agreed that the constitutional guarantee of due process of law is applicable in such proceedings. It held that Arizona's Juvenile Code is to be read as "impliedly" implementing the "due process concept." It then proceeded to identify and describe "the particular elements which constitute due process in a juvenile hearing." It concluded that the proceedings ending in commitment of Gerald Gault did not offend those requirements. We do not agree, and we reverse. We begin with a statement of the facts.

I.

On Monday, June 8, 1964, at about 10 a. m., Gerald Francis Gault and a friend, Ronald Lewis, were taken into custody by the Sheriff of Gila County. Gerald was then still subject to a six months' probation order which had been entered on February 25, 1964, as a result of his having been in the company of another boy who had stolen a wallet from a lady's purse. The police action on June 8 was taken as the result of a verbal complaint by a neighbor of the boys, Mrs. Cook, about a telephone call made to her in which the caller or callers made lewd or indecent remarks. It will suffice for purposes of this opinion to say that the remarks or questions put to her were of the irritatingly offensive, adolescent, sex variety.

At the time Gerald was picked up, his mother and father were both at work. No notice that Gerald was being taken into custody was left at the home. No other steps were taken to advise them that their son had, in effect, been arrested. Gerald was taken to the Children's Detention Home. When his mother arrived home at about 6 o'clock, Gerald was not there. Gerald's older brother was sent to look for him at the trailer home of the Lewis family. He apparently learned then that Gerald was in custody. He so informed his mother. The two of them went to the Detention Home. The deputy probation officer, Flagg, who was also superintendent of the Detention Home, told Mrs. Gault "why Jerry was there" and said that a hearing would be held in Juvenile Court at 3 o'clock the following day, June 9.

Officer Flagg filed a petition with the court on the hearing day, June 9, 1964. It was not served on the Gaults. Indeed, none of them saw this petition until the habeas corpus hearing on August 17, 1964. The petition was entirely formal. It made no reference to any factual basis for the judicial action which it initiated. It recited only that "said minor is under the age of eighteen years, and is in need of the protection of this Honorable Court; [and that] said minor is a delinquent minor." It prayed for a hearing and an order regarding "the care and custody of said minor." Officer Flagg executed a formal affidavit in support of the petition.

On June 9, Gerald, his mother, his older brother, and Probation Officers Flagg and Henderson appeared before the Juvenile Judge in chambers. Gerald's father was not there. He was at work out of the city. Mrs. Cook, the complainant, was not there. No one was sworn at this hearing. No transcript or recording was made. No memorandum or record of the substance of the proceedings was prepared. Our information about the proceed-

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ings and the subsequent hearing on June 15, derives entirely from the testimony of the Juvenile Court Judge,[1] Mr. and Mrs. Gault and Officer Flagg at the habeas corpus proceeding conducted two months later. From this, it appears that at the June 9 hearing Gerald was questioned by the judge about the telephone call. There was conflict as to what he said. His mother recalled that Gerald said he only dialed Mrs. Cook's number and handed the telephone to his friend, Ronald. Officer Flagg recalled that Gerald had admitted making the lewd remarks. Judge McGhee testified that Gerald "admitted making one of these [lewd] statements." At the conclusion of the hearing, the judge said he would "think about it." Gerald was taken back to the Detention Home. He was not sent to his own home with his parents. On June 11 or 12, after having been detained since June 8, Gerald was released and driven home.[2] There is no explanation in the record as to why he was kept in the Detention Home or why he was released. At 5 p. m. on the day of Gerald's release, Mrs. Gault received a note signed by Officer Flagg. It was on plain paper, not letterhead. Its entire text was as follows:

"Mrs. Gault:

"Judge McGHEE has set Monday June 15, 1964 at 11:00 A. M. as the date and time for further Hearings on Gerald's delinquency

"/s/Flagg"

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[1] Under Arizona law, juvenile hearings are conducted by a judge of the Superior Court, designated by his colleagues on the Superior Court to serve as Juvenile Court Judge. Arizona Const., Art. 6, § 15; Arizona Revised Statutes (hereinafter ARS) §§ 8-201, 8-202.

[2] There is a conflict between the recollection of Mrs. Gault and that of Officer Flagg. Mrs. Gault testified that Gerald was released on Friday, June 12, Officer Flagg that it had been on Thursday, June 11. This was from memory; he had no record, and the note hereafter referred to was undated.

At the appointed time on Monday, June 15, Gerald, his father and mother, Ronald Lewis and his father, and Officers Flagg and Henderson were present before Judge McGhee. Witnesses at the habeas corpus proceeding differed in their recollections of Gerald's testimony at the June 15 hearing. Mr. and Mrs. Gault recalled that Gerald again testified that he had only dialed the number and that the other boy had made the remarks. Officer Flagg agreed that at this hearing Gerald did not admit making the lewd remarks.[3] But Judge McGhee recalled that "there was some admission again of some of the lewd statements. He—he didn't admit any of the more serious lewd statements."[4] Again, the complainant, Mrs. Cook, was not present. Mrs. Gault asked that Mrs. Cook be present "so she could see which boy that done the talking, the dirty talking over the phone." The Juvenile Judge said "she didn't have to be present at that hearing." The judge did not speak to Mrs. Cook or communicate with her at any time. Probation Officer Flagg had talked to her once—over the telephone on June 9.

At this June 15 hearing a "referral report" made by the probation officers was filed with the court, although not disclosed to Gerald or his parents. This listed the charge as "Lewd Phone Calls." At the conclusion of the hearing, the judge committed Gerald as a juvenile delinquent to the State Industrial School "for the period of his minority [that is, until 21], unless sooner dis-

[3] Officer Flagg also testified that Gerald had not, when questioned at the Detention Home, admitted having made any of the lewd statements, but that each boy had sought to put the blame on the other. There was conflicting testimony as to whether Ronald had accused Gerald of making the lewd statements during the June 15 hearing.

[4] Judge McGhee also testified that Gerald had not denied "certain statements" made to him at the hearing by Officer Henderson.

charged by due process of law." An order to that effect was entered. It recites that "after a full hearing and due deliberation the Court finds that said minor is a delinquent child, and that said minor is of the age of 15 years."

No appeal is permitted by Arizona law in juvenile cases. On August 3, 1964, a petition for a writ of habeas corpus was filed with the Supreme Court of Arizona and referred by it to the Superior Court for hearing.

At the habeas corpus hearing on August 17, Judge McGhee was vigorously cross-examined as to the basis for his actions. He testified that he had taken into account the fact that Gerald was on probation. He was asked "under what section of . . . the code you found the boy delinquent?"

His answer is set forth in the margin.[5] In substance, he concluded that Gerald came within ARS § 8–201–6 (a), which specifies that a "delinquent child" includes one "who has violated a law of the state or an ordinance or regulation of a political subdivision thereof." The law which Gerald was found to have violated is ARS § 13–377. This section of the Arizona Criminal Code provides that a person who "in the presence or hearing of any woman or child . . . uses vulgar, abusive or obscene language, is guilty of a misdemeanor. . . ." The penalty specified in the Criminal Code, which would

[5] "Q. All right. Now, Judge, would you tell me under what section of the law or tell me under what section of—of the code you found the boy delinquent?

"A. Well, there is a—I think it amounts to disturbing the peace. I can't give you the section, but I can tell you the law, that when one person uses lewd language in the presence of another person, that it can amount to—and I consider that when a person makes it over the phone, that it is considered in the presence, I might be wrong, that is one section. The other section upon which I consider the boy delinquent is Section 8–201, Subsection (d), habitually involved in immoral matters."

apply to an adult, is $5 to $50, or imprisonment for not more than two months. The judge also testified that he acted under ARS § 8–201–6 (d) which includes in the definition of a "delinquent child" one who, as the judge phrased it, is "habitually involved in immoral matters." [6]

Asked about the basis for his conclusion that Gerald was "habitually involved in immoral matters," the judge testified, somewhat vaguely, that two years earlier, on July 2, 1962, a "referral" was made concerning Gerald, "where the boy had stolen a baseball glove from another boy and lied to the Police Department about it." The judge said there was "no hearing," and "no accusation" relating to this incident, "because of lack of material foundation." But it seems to have remained in his mind as a relevant factor. The judge also testified that Gerald had admitted making other nuisance phone calls in the past which, as the judge recalled the boy's testimony, were "silly calls, or funny calls, or something like that."

The Superior Court dismissed the writ, and appellants sought review in the Arizona Supreme Court. That court stated that it considered appellants' assignments of error as urging (1) that the Juvenile Code, ARS § 8–201 to § 8–239, is unconstitutional because it does not require that parents and children be apprised of the specific charges, does not require proper notice of a hearing, and does not provide for an appeal; and (2) that the proceed-

[6] ARS § 8–201–6, the section of the Arizona Juvenile Code which defines a delinquent child, reads:

"'Delinquent child' includes:

"(a) A child who has violated a law of the state or an ordinance or regulation of a political subdivision thereof.

"(b) A child who, by reason of being incorrigible, wayward or habitually disobedient, is uncontrolled by his parent, guardian or custodian.

"(c) A child who is habitually truant from school or home.

"(d) A child who habitually so deports himself as to injure or endanger the morals or health of himself or others."

ings and order relating to Gerald constituted a denial of due process of law because of the absence of adequate notice of the charge and the hearing; failure to notify appellants of certain constitutional rights including the rights to counsel and to confrontation, and the privilege against self-incrimination; the use of unsworn hearsay testimony; and the failure to make a record of the proceedings. Appellants further asserted that it was error for the Juvenile Court to remove Gerald from the custody of his parents without a showing and finding of their unsuitability, and alleged a miscellany of other errors under state law.

The Supreme Court handed down an elaborate and wide-ranging opinion affirming dismissal of the writ and stating the court's conclusions as to the issues raised by appellants and other aspects of the juvenile process. In their jurisdictional statement and brief in this Court, appellants do not urge upon us all of the points passed upon by the Supreme Court of Arizona. They urge that we hold the Juvenile Code of Arizona invalid on its face or as applied in this case because, contrary to the Due Process Clause of the Fourteenth Amendment, the juvenile is taken from the custody of his parents and committed to a state institution pursuant to proceedings in which the Juvenile Court has virtually unlimited discretion, and in which the following basic rights are denied:

1. Notice of the charges;
2. Right to counsel;
3. Right to confrontation and cross-examination;
4. Privilege against self-incrimination;
5. Right to a transcript of the proceedings; and
6. Right to appellate review.

We shall not consider other issues which were passed upon by the Supreme Court of Arizona. We emphasize

that we indicate no opinion as to whether the decision of that court with respect to such other issues does or does not conflict with requirements of the Federal Constitution.[7]

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[7] For example, the laws of Arizona allow arrest for a misdemeanor only if a warrant is obtained or if it is committed in the presence of the officer. ARS § 13–1403. The Supreme Court of Arizona held that this is inapplicable in the case of juveniles. See ARS § 8–221 which relates specifically to juveniles. But compare *Two Brothers and a Case of Liquor*, Juv. Ct. D. C., Nos. 66–2652–J, 66–2653–J, December 28, 1966 (opinion of Judge Ketcham); Standards for Juvenile and Family Courts, Children's Bureau Pub. No. 437–1966, p. 47 (hereinafter cited as Standards); New York Family Court Act § 721 (1963) (hereinafter cited as N. Y. Family Court Act).

The court also held that the judge may consider hearsay if it is "of a kind on which reasonable men are accustomed to rely in serious affairs." But compare Note, Juvenile Delinquents: The Police, State Courts, and Individualized Justice, 79 Harv. L. Rev. 775, 794–795 (1966) (hereinafter cited as Harvard Law Review Note):

"The informality of juvenile court hearings frequently leads to the admission of hearsay and unsworn testimony. It is said that 'close adherence to the strict rules of evidence might prevent the court from obtaining important facts as to the child's character and condition which could only be to the child's detriment.' The assumption is that the judge will give normally inadmissible evidence only its proper weight. It is also declared in support of these evidentiary practices that the juvenile court is not a criminal court, that the importance of the hearsay rule has been overestimated, and that allowing an attorney to make 'technical objections' would disrupt the desired informality of the proceedings. But to the extent that the rules of evidence are not merely technical or historical, but like the hearsay rule have a sound basis in human experience, they should not be rejected in any judicial inquiry. Juvenile court judges in Los Angeles, Tucson, and Wisconsin Rapids, Wisconsin report that they are satisfied with the operation of their courts despite application of unrelaxed rules of evidence." (Footnotes omitted.)

It ruled that the correct burden of proof is that "the juvenile judge must be persuaded by clear and convincing evidence that the infant has committed the alleged delinquent act." Compare the

II.

The Supreme Court of Arizona held that due process of law is requisite to the constitutional validity of proceedings in which a court reaches the conclusion that a juvenile has been at fault, has engaged in conduct prohibited by law, or has otherwise misbehaved with the consequence that he is committed to an institution in which his freedom is curtailed. This conclusion is in accord with the decisions of a number of courts under both federal and state constitutions.[8]

This Court has not heretofore decided the precise question. In *Kent* v. *United States*, 383 U. S. 541 (1966), we considered the requirements for a valid waiver of the "exclusive" jurisdiction of the Juvenile Court of the District of Columbia so that a juvenile could be tried in the adult criminal court of the District. Although our decision turned upon the language of the statute, we emphasized the necessity that "the basic requirements of due process and fairness" be satisfied in such proceedings.[9] *Haley* v. *Ohio*, 332 U. S. 596 (1948), involved the admissibility, in a state criminal court of general jurisdiction, of a confession by a 15-year-old boy. The Court held that the Fourteenth Amendment applied to

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"preponderance of the evidence" test, N. Y. Family Court Act § 744 (where maximum commitment is three years, §§ 753, 758). Cf. Harvard Law Review Note, p. 795.

[8] See, *e. g.*, *In the Matters of Gregory W. and Gerald S.*, 19 N. Y. 2d 55, 224 N. E. 2d 102 (1966); *In the Interests of Carlo and Stasilowicz*, 48 N. J. 224, 225 A. 2d 110 (1966); *People* v. *Dotson*, 46 Cal. 2d 891, 299 P. 2d 875 (1956); *Pee* v. *United States*, 107 U. S. App. D. C. 47, 274 F. 2d 556 (1959); *Wissenburg* v. *Bradley*, 209 Iowa 813, 229 N. W. 205 (1930); *Bryant* v. *Brown*, 151 Miss. 398, 118 So. 184 (1928); *Dendy* v. *Wilson*, 142 Tex. 460, 179 S. W. 2d 269 (1944); *Application of Johnson*, 178 F. Supp. 155 (D. C. N. J. 1957).

[9] 383 U. S., at 553.

prohibit the use of the coerced confession. MR. JUSTICE DOUGLAS said, "Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law." [10] To the same effect is *Gallegos* v. *Colorado*, 370 U. S. 49 (1962). Accordingly, while these cases relate only to restricted aspects of the subject, they unmistakably indicate that, whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.

We do not in this opinion consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state. We do not even consider the entire process relating to juvenile "delinquents." For example, we are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process. See note 48, *infra*. We consider only the problems presented to us by this case. These relate to the proceedings by which a determination is made as to whether a juvenile is a "delinquent" as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution. As to these proceedings, there appears to be little current dissent from the proposition that the Due Process Clause has a role to play.[11] The problem is to ascertain

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[10] 332 U. S., at 601 (opinion for four Justices).

[11] See Report by the President's Commission on Law Enforcement and Administration of Justice, "The Challenge of Crime in a Free Society" (1967) (hereinafter cited as Nat'l Crime Comm'n Report), pp. 81, 85–86; Standards, p. 71; Gardner, The Kent Case and the Juvenile Court: A Challenge to Lawyers, 52 A. B. A. J. 923 (1966); Paulsen, Fairness to the Juvenile Offender, 41 Minn. L. Rev. 547 (1957); Ketcham, The Legal Renaissance in the Juvenile Court, 60 Nw. U. L. Rev. 585 (1965); Allen, The Borderland of Criminal

the precise impact of the due process requirement upon such proceedings.

From the inception of the juvenile court system, wide differences have been tolerated—indeed insisted upon—between the procedural rights accorded to adults and those of juveniles. In practically all jurisdictions, there are rights granted to adults which are withheld from juveniles. In addition to the specific problems involved in the present case, for example, it has been held that the juvenile is not entitled to bail, to indictment by grand jury, to a public trial or to trial by jury.[12] It is frequent practice that rules governing the arrest and interrogation of adults by the police are not observed in the case of juveniles.[13]

The history and theory underlying this development are well-known, but a recapitulation is necessary for purposes of this opinion. The Juvenile Court movement began in this country at the end of the last century. From the juvenile court statute adopted in Illinois in 1899, the system has spread to every State in the Union, the District of Columbia, and Puerto Rico.[14] The con-

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Justice (1964), pp. 19–23; Harvard Law Review Note, p. 791; Note, Rights and Rehabilitation in the Juvenile Courts, 67 Col. L. Rev. 281 (1967); Comment, Criminal Offenders in the Juvenile Court: More Brickbats and Another Proposal, 114 U. Pa. L. Rev. 1171 (1966).

[12] See *Kent* v. *United States*, 383 U. S. 541, 555 and n. 22 (1966).

[13] See n. 7, *supra*.

[14] See National Council of Juvenile Court Judges, Directory and Manual (1964), p. 1. The number of Juvenile Judges as of 1964 is listed as 2,987, of whom 213 are full-time Juvenile Court Judges. *Id.*, at 305. The Nat'l Crime Comm'n Report indicates that half of these judges have no undergraduate degree, a fifth have no college education at all, a fifth are not members of the bar, and three-quarters devote less than one-quarter of their time to juvenile matters. See also McCune, Profile of the Nation's Juvenile Court Judges (monograph, George Washington University, Center for the Behavioral Sciences, 1965), which is a detailed statistical study of Juvenile

stitutionality of Juvenile Court laws has been sustained in over 40 jurisdictions against a variety of attacks.[15]

The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. They were profoundly convinced that society's duty to the child could not be confined by the concept of justice alone. They believed that society's role was not to ascertain whether the child was "guilty" or "innocent," but "What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career." [16] The child—essentially good, as they saw it—was to be made "to feel that he is the object of [the state's] care and solicitude," [17] not that he was under arrest or on trial. The rules of criminal procedure were therefore altogether inapplicable. The apparent rigidities, technicalities, and harshness which they observed in both substantive and procedural criminal law were therefore to be discarded. The idea of crime and punishment was to be abandoned. The child was

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Court Judges, and indicates additionally that about a quarter of these judges have no law school training at all. About one-third of all judges have no probation and social work staff available to them; between eighty and ninety percent have no available psychologist or psychiatrist. *Ibid.* It has been observed that while "good will, compassion, and similar virtues are . . . admirably prevalent throughout the system . . . expertise, the keystone of the whole venture, is lacking." Harvard Law Review Note, p. 809. In 1965, over 697,000 delinquency cases (excluding traffic) were disposed of in these courts, involving some 601,000 children, or 2% of all children between 10 and 17. Juvenile Court Statistics—1965, Children's Bureau Statistical Series No. 85 (1966), p. 2.

[15] See Paulsen, Kent v. United States: The Constitutional Context of Juvenile Cases, 1966 Sup. Ct. Review 167, 174.

[16] Julian Mack, The Juvenile Court, 23 Harv. L. Rev. 104, 119–120 (1909).

[17] *Id.*, at 120.

to be "treated" and "rehabilitated" and the procedures, from apprehension through institutionalization, were to be "clinical" rather than punitive.

These results were to be achieved, without coming to conceptual and constitutional grief, by insisting that the proceedings were not adversary, but that the state was proceeding as *parens patriae*.[18] The Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance. The phrase was taken from chancery practice, where, however, it was used to describe the power of the state to act *in loco parentis* for the purpose of protecting the property interests and the person of the child.[19] But there is no trace of the doctrine in the history of criminal jurisprudence. At common law, children under seven were considered incapable of possessing criminal intent. Beyond that age, they were subjected to arrest, trial, and in theory to punishment like adult offenders.[20] In these old days,

[18] *Id.*, at 109; Paulsen, *op. cit. supra*, n. 15, at 173–174. There seems to have been little early constitutional objection to the special procedures of juvenile courts. But see Waite, How Far Can Court Procedure Be Socialized Without Impairing Individual Rights, 12 J. Crim. L. & Criminology 339, 340 (1922): "The court which must direct its procedure even apparently to do something *to* a child because of what he *has done*, is parted from the court which is avowedly concerned only with doing something *for* a child because of what he *is* and *needs*, by a gulf too wide to be bridged by any humanity which the judge may introduce into his hearings, or by the habitual use of corrective rather than punitive methods after conviction."

[19] Paulsen, *op. cit. supra*, n. 15, at 173; Hurley, Origin of the Illinois Juvenile Court Law, in The Child, The Clinic, and the Court (1925), pp. 320, 328.

[20] Julian Mack, The Chancery Procedure in the Juvenile Court, in The Child, The Clinic, and the Court (1925), p. 310.

the state was not deemed to have authority to accord them fewer procedural rights than adults.

The right of the state, as *parens patriae,* to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right "not to liberty but to custody." He can be made to attorn to his parents, to go to school, etc. If his parents default in effectively performing their custodial functions—that is, if the child is "delinquent"—the state may intervene. In doing so, it does not deprive the child of any rights, because he has none. It merely provides the "custody" to which the child is entitled.[21] On this basis, proceedings involving juveniles were described as "civil" not "criminal" and therefore not subject to the requirements which restrict the state when it seeks to deprive a person of his liberty.[22]

Accordingly, the highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context. The constitutional and theoretical basis for this peculiar system is—to say the least—debatable. And in practice, as we remarked in the *Kent* case, *supra,* the results have

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[21] See, *e. g.,* Shears, Legal Problems Peculiar to Children's Courts, 48 A. B. A. J. 719, 720 (1962) ("The basic right of a juvenile is not to liberty but to custody. He has the right to have someone take care of him, and if his parents do not afford him this custodial privilege, the law must do so."); *Ex parte Crouse,* 4 Whart. 9, 11 (Sup. Ct. Pa. 1839); *Petition of Ferrier,* 103 Ill. 367, 371–373 (1882).

[22] The Appendix to the opinion of Judge Prettyman in *Pee* v. *United States,* 107 U. S. App. D. C. 47, 274 F. 2d 556 (1959), lists authority in 51 jurisdictions to this effect. Even rules required by due process in civil proceedings, however, have not generally been deemed compulsory as to proceedings affecting juveniles. For example, constitutional requirements as to notice of issues, which would commonly apply in civil cases, are commonly disregarded in juvenile proceedings, as this case illustrates.

not been entirely satisfactory.[23] Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. In 1937, Dean Pound wrote: "The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts . . . ." [24] The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have fre-

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[23] "There is evidence . . . that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." 383 U. S., at 556, citing Handler, The Juvenile Court and the Adversary System: Problems of Function and Form, 1965 Wis. L. Rev. 7; Harvard Law Review Note; and various congressional materials set forth in 383 U. S., at 546, n. 5.

On the other hand, while this opinion and much recent writing concentrate upon the failures of the Juvenile Court system to live up to the expectations of its founders, the observation of the Nat'l Crime Comm'n Report should be kept in mind:

"Although its shortcomings are many and its results too often disappointing, the juvenile justice system in many cities is operated by people who are better educated and more highly skilled, can call on more and better facilities and services, and has more ancillary agencies to which to refer its clientele than its adult counterpart." *Id.*, at 78.

[24] Foreword to Young, Social Treatment in Probation and Delinquency (1937), p. xxvii. The 1965 Report of the United States Commission on Civil Rights, "Law Enforcement—A Report on Equal Protection in the South," pp. 80–83, documents numerous instances in which "local authorities used the broad discretion afforded them by the absence of safeguards [in the juvenile process]" to punish, intimidate, and obstruct youthful participants in civil rights demonstrations. See also Paulsen, Juvenile Courts, Family Courts, and the Poor Man, 54 Calif. L. Rev. 694, 707–709 (1966).

quently resulted not in enlightened procedure, but in arbitrariness. The Chairman of the Pennsylvania Council of Juvenile Court Judges has recently observed: "Unfortunately, loose procedures, high-handed methods and crowded court calendars, either singly or in combination, all too often, have resulted in depriving some juveniles of fundamental rights that have resulted in a denial of due process." [25]

Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate

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[25] Lehman, A Juvenile's Right to Counsel in a Delinquency Hearing, 17 Juvenile Court Judges Journal 53, 54 (1966).

Compare the observation of the late Arthur T. Vanderbilt, Chief Justice of the Supreme Court of New Jersey, in a foreword to Virtue, Basic Structure for Children's Services in Michigan (1953), p. x:

"In their zeal to care for children neither juvenile judges nor welfare workers can be permitted to violate the Constitution, especially the constitutional provisions as to due process that are involved in moving a child from its home. The indispensable elements of due process are: first, a tribunal with jurisdiction; second, notice of a hearing to the proper parties; and finally, a fair hearing. All three must be present if we are to treat the child as an individual human being and not to revert, in spite of good intentions, to the more primitive days when he was treated as a chattel."

We are warned that the system must not "degenerate into a star chamber proceeding with the judge imposing his own particular brand of culture and morals on indigent people . . . ." Judge Marion G. Woodward, letter reproduced in 18 Social Service Review 366, 368 (1944). Doctor Bovet, the Swiss psychiatrist, in his monograph for the World Health Organization, Psychiatric Aspects of Juvenile Delinquency (1951), p. 79, stated that: "One of the most definite conclusions of this investigation is that few fields exist in which more serious coercive measures are applied, on such flimsy objective evidence, than in that of juvenile delinquency." We are told that "The judge as amateur psychologist, experimenting upon the unfortunate children who must appear before him, is neither an attractive nor a convincing figure." Harvard Law Review Note, at 808.

or inaccurate findings of fact and unfortunate prescriptions of remedy. Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.[26] As Mr. Justice

[26] The impact of denying fundamental procedural due process to juveniles involved in "delinquency" charges is dramatized by the following considerations: (1) In 1965, persons under 18 accounted for about one-fifth of all arrests for serious crimes (Nat'l Crime Comm'n Report, p. 55) and over half of all arrests for serious property offenses (*id.*, at 56), and in the same year some 601,000 children under 18, or 2% of all children between 10 and 17, came before juvenile courts (Juvenile Court Statistics—1965, Children's Bureau Statistical Series No. 85 (1966) p. 2). About one out of nine youths will be referred to juvenile court in connection with a delinquent act (excluding traffic offenses) before he is 18 (Nat'l Crime Comm'n Report, p. 55). Cf. also Wheeler & Cottrell, Juvenile Delinquency—Its Prevention and Control (Russell Sage Foundation, 1965), p. 2; Report of the President's Commission on Crime in the District of Columbia (1966) (hereinafter cited as D. C. Crime Comm'n Report), p. 773. Furthermore, most juvenile crime apparently goes undetected or not formally punished. Wheeler & Cottrell, *supra*, observe that "[A]lmost all youngsters have committed at least one of the petty forms of theft and vandalism in the course of their adolescence." *Id.*, at 28–29. See also Nat'l Crime Comm'n Report, p. 55, where it is stated that "self-report studies reveal that perhaps 90 percent of all young people have committed at least one act for which they could have been brought to juvenile court." It seems that the rate of juvenile delinquency is also steadily rising. See Nat'l Crime Comm'n Report, p. 56; Juvenile Court Statistics, *supra*, pp. 2–3. (2) In New York, where most juveniles are represented by counsel (see n. 69, *infra*) and substantial procedural rights are afforded (see, *e. g.*, nn. 80, 81, 99, *infra*), out of a fiscal year 1965–1966 total of 10,755 juvenile proceedings involving boys, 2,242 were dismissed for failure of proof at the fact-finding hearing; for girls, the figures were 306 out of a total of 1,051. New York Judicial Conference, Twelfth Annual Report, pp. 314, 316 (1967). (3) In about one-half of the States, a juvenile may be transferred to an adult penal institution after a juvenile court has found him "delinquent" (Delin-

Frankfurter has said: "The history of American freedom is, in no small measure, the history of procedure." [27] But in addition, the procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data. "Procedure is to law what 'scientific method' is to science." [28]

It is claimed that juveniles obtain benefits from the special procedures applicable to them which more than offset the disadvantages of denial of the substance of normal due process. As we shall discuss, the observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process.[29] But it is important, we think, that the claimed benefits of the juvenile process should be candidly appraised. Neither sentiment nor folklore should cause us to shut our eyes, for example, to such startling findings

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quent Children in Penal Institutions, Children's Bureau Pub. No. 415–1964, p. 1). (4) In some jurisdictions a juvenile may be subjected to criminal prosecution for the same offense for which he has served under a juvenile court commitment. However, the Texas procedure to this effect has recently been held unconstitutional by a federal district court judge, in a habeas corpus action. *Sawyer* v. *Hauck*, 245 F. Supp. 55 (D. C. W. D. Tex. 1965). (5) In most of the States the juvenile may end in criminal court through waiver (Harvard Law Review Note, p. 793).

[27] *Malinski* v. *New York*, 324 U. S. 401, 414 (1945) (separate opinion).

[28] Foster, Social Work, the Law, and Social Action, in Social Casework, July 1964, pp. 383, 386.

[29] See Note, Rights and Rehabilitation in the Juvenile Courts, 67 Col. L. Rev. 281, 321, and *passim* (1967).

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as that reported in an exceptionally reliable study of repeaters or recidivism conducted by the Stanford Research Institute for the President's Commission on Crime in the District of Columbia. This Commission's Report states:

> "In fiscal 1966 approximately 66 percent of the 16- and 17-year-old juveniles referred to the court by the Youth Aid Division had been before the court previously. In 1965, 56 percent of those in the Receiving Home were repeaters. The SRI study revealed that 61 percent of the sample Juvenile Court referrals in 1965 had been previously referred at least once and that 42 percent had been referred at least twice before." *Id.*, at 773.

Certainly, these figures and the high crime rates among juveniles to which we have referred (*supra*, n. 26), could not lead us to conclude that the absence of constitutional protections reduces crime, or that the juvenile system, functioning free of constitutional inhibitions as it has largely done, is effective to reduce crime or rehabilitate offenders. We do not mean by this to denigrate the juvenile court process or to suggest that there are not aspects of the juvenile system relating to offenders which are valuable. But the features of the juvenile system which its proponents have asserted are of unique benefit will not be impaired by constitutional domestication. For example, the commendable principles relating to the processing and treatment of juveniles separately from adults are in no way involved or affected by the procedural issues under discussion.[30] Further, we are

[30] Here again, however, there is substantial question as to whether fact and pretension, with respect to the separate handling and treatment of children, coincide. See generally *infra*.

While we are concerned only with procedure before the juvenile court in this case, it should be noted that to the extent that the special procedures for juveniles are thought to be justified by the

told that one of the important benefits of the special juvenile court procedures is that they avoid classifying the juvenile as a "criminal." The juvenile offender is now classed as a "delinquent." There is, of course, no reason why this should not continue. It is disconcerting,

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special consideration and treatment afforded them, there is reason to doubt that juveniles always receive the benefits of such a *quid pro quo*. As to the problem and importance of special care at the adjudicatory stage, cf. nn. 14 and 26, *supra*. As to treatment, see Nat'l Crime Comm'n Report, pp. 80, 87; D. C. Crime Comm'n Report, pp. 665–676, 686–687 (at p. 687 the Report refers to the District's "bankruptcy of dispositional resources"), 692–695, 700–718 (at p. 701 the Report observes that "The Department of Public Welfare currently lacks even the rudiments of essential diagnostic and clinical services"); Wheeler & Cottrell, Juvenile Delinquency—Its Prevention and Control (Russell Sage Foundation, 1965), pp. 32–35; Harvard Law Review Note, p. 809; Paulsen, Juvenile Courts, Family Courts, and the Poor Man, 54 Calif. L. Rev. 694, 709–712 (1966); Polier, A View From the Bench (1964). Cf. also, In the Matter of the Youth House, Inc., Report of the July 1966 "A" Term of the Bronx County Grand Jury, Supreme Court of New York, County of Bronx, Trial Term, Part XII, March 21, 1967 (cf. New York Times, March 23, 1967, p. 1, col. 8). The high rate of juvenile recidivism casts some doubt upon the adequacy of treatment afforded juveniles. See D. C. Crime Comm'n Report, p. 773; Nat'l Crime Comm'n Report, pp. 55, 78.

In fact, some courts have recently indicated that appropriate treatment is essential to the validity of juvenile custody, and therefore that a juvenile may challenge the validity of his custody on the ground that he is not in fact receiving any special treatment. See *Creek* v. *Stone*, — U. S. App. D. C. —, 379 F. 2d 106 (1967); *Kautter* v. *Reid*, 183 F. Supp. 352 (D. C. D. C. 1960); *White* v. *Reid*, 125 F. Supp. 647 (D. C. D. C. 1954). See also *Elmore* v. *Stone*, 122 U. S. App. D. C. 416, 355 F. 2d 841 (1966) (separate statement of Bazelon, C. J.); *Clayton* v. *Stone*, 123 U. S. App. D. C. 181, 358 F. 2d 548 (1966) (separate statement of Bazelon, C. J.). Cf. Wheeler & Cottrell, *supra*, pp. 32, 35; *In re Rich*, 125 Vt. 373, 216 A. 2d 266 (1966). Cf. also *Rouse* v. *Cameron*, 125 U. S. App. D. C. 366, 373 F. 2d 451 (1966); *Millard* v. *Cameron*, 125 U. S. App. D. C. 383, 373 F. 2d 468 (1966).

however, that this term has come to involve only slightly less stigma than the term "criminal" applied to adults.[31] It is also emphasized that in practically all jurisdictions, statutes provide that an adjudication of the child as a delinquent shall not operate as a civil disability or disqualify him for civil service appointment.[32] There is no reason why the application of due process requirements should interfere with such provisions.

Beyond this, it is frequently said that juveniles are protected by the process from disclosure of their deviational behavior. As the Supreme Court of Arizona phrased it in the present case, the summary procedures of Juvenile Courts are sometimes defended by a statement that it is the law's policy "to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past." This claim of secrecy, however, is more rhetoric than reality. Disclosure of court records is discretionary with the judge in most jurisdictions. Statutory restrictions almost invariably apply only to the court records, and even as to those the evidence is that many courts routinely furnish information to the FBI and the military, and on request to government agencies and even to private employers.[33] Of more importance are police records. In most States the police keep a complete file of juvenile "police contacts" and have complete discretion as to disclosure of

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[31] "[T]he word 'delinquent' has today developed such invidious connotations that the terminology is in the process of being altered; the new descriptive phrase is 'persons in need of supervision,' usually shortened to 'pins.'" Harvard Law Review Note, p. 799, n. 140. The N. Y. Family Court Act § 712 distinguishes between "delinquents" and "persons in need of supervision."

[32] See, *e. g.*, the Arizona provision, ARS § 8-228.

[33] Harvard Law Review Note, pp. 784–785, 800. Cf. Nat'l Crime Comm'n Report, pp. 87–88; Ketcham, The Unfulfilled Promise of the Juvenile Court, 7 Crime & Delin. 97, 102–103 (1961).

juvenile records. Police departments receive requests for information from the FBI and other law-enforcement agencies, the Armed Forces, and social service agencies, and most of them generally comply.[34] Private employers word their application forms to produce information concerning juvenile arrests and court proceedings, and in some jurisdictions information concerning juvenile police contacts is furnished private employers as well as government agencies.[35]

In any event, there is no reason why, consistently with due process, a State cannot continue, if it deems it appropriate, to provide and to improve provision for the confidentiality of records of police contacts and court action relating to juveniles. It is interesting to note, however, that the Arizona Supreme Court used the confidentiality argument as a justification for the type of notice which is here attacked as inadequate for due process purposes. The parents were given merely general notice that their child was charged with "delinquency." No facts were specified. The Arizona court held, however, as we shall discuss, that in addition to this general "notice," the child and his parents must be advised "of the facts involved in the case" no later than the initial hearing by the judge. Obviously, this does not "bury" the word about the child's transgressions. It merely defers the time of disclosure to a point when it is of limited use to the child or his parents in preparing his defense or explanation.

Further, it is urged that the juvenile benefits from informal proceedings in the court. The early conception

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[34] Harvard Law Review Note, pp. 785–787.

[35] *Id.*, at 785, 800. See also, with respect to the problem of confidentiality of records, Note, Rights and Rehabilitation in the Juvenile Courts, 67 Col. L. Rev. 281, 286–289 (1967). Even the privacy of the juvenile hearing itself is not always adequately protected. *Id.*, at 285–286.

of the Juvenile Court proceeding was one in which a fatherly judge touched the heart and conscience of the erring youth by talking over his problems, by paternal advice and admonition, and in which, in extreme situations, benevolent and wise institutions of the State provided guidance and help "to save him from a downward career." [36] Then, as now, goodwill and compassion were admirably prevalent. But recent studies have, with surprising unanimity, entered sharp dissent as to the validity of this gentle conception. They suggest that the appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process—may be a more impressive and more therapeutic attitude so far as the juvenile is concerned. For example, in a recent study, the sociologists Wheeler and Cottrell observe that when the procedural laxness of the *"parens patriae"* attitude is followed by stern disciplining, the contrast may have an adverse effect upon the child, who feels that he has been deceived or enticed. They conclude as follows: "Unless appropriate due process of law is followed, even the juvenile who has violated the law may not feel that he is being fairly treated and may therefore resist the rehabilitative efforts of court personnel." [37] Of course, it is not suggested that juvenile court judges should fail appropriately to take account, in their demeanor and conduct, of the emotional and psychological attitude of the juveniles with whom they

[36] Mack, The Juvenile Court, 23 Harv. L. Rev. 104, 120 (1909).

[37] Juvenile Delinquency—Its Prevention and Control (Russell Sage Foundation, 1966), p. 33. The conclusion of the Nat'l Crime Comm'n Report is similar: "[T]here is increasing evidence that the informal procedures, contrary to the original expectation, may themselves constitute a further obstacle to effective treatment of the delinquent to the extent that they engender in the child a sense of injustice provoked by seemingly all-powerful and challengeless exercise of authority by judges and probation officers." *Id.*, at 85. See also Allen, The Borderland of Criminal Justice (1964), p. 19.

are confronted. While due process requirements will, in some instances, introduce a degree of order and regularity to Juvenile Court proceedings to determine delinquency, and in contested cases will introduce some elements of the adversary system, nothing will require that the conception of the kindly juvenile judge be replaced by its opposite, nor do we here rule upon the question whether ordinary due process requirements must be observed with respect to hearings to determine the disposition of the delinquent child.

Ultimately, however, we confront the reality of that portion of the Juvenile Court process with which we deal in this case. A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes "a building with whitewashed walls, regimented routine and institutional hours . . . ." [38] Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and "delinquents" confined with him for anything from waywardness [39] to rape and homicide.

In view of this, it would be extraordinary if our Constitution did not require the procedural regularity and

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[38] *Holmes' Appeal,* 379 Pa. 599, 616, 109 A. 2d 523, 530 (1954) (Musmanno, J., dissenting). See also *The State* (*Sheerin*) v. *Governor,* [1966] I. R. 379 (Supreme Court of Ireland); *Trimble* v. *Stone,* 187 F. Supp. 483, 485–486 (D. C. D. C. 1960); Allen, The Borderland of Criminal Justice (1964), pp. 18, 52–56.

[39] Cf. the Juvenile Code of Arizona, ARS § 8–201–6.

the exercise of care implied in the phrase "due process." Under our Constitution, the condition of being a boy does not justify a kangaroo court. The traditional ideas of Juvenile Court procedure, indeed, contemplated that time would be available and care would be used to establish precisely what the juvenile did and why he did it—was it a prank of adolescence or a brutal act threatening serious consequences to himself or society unless corrected? [40] Under traditional notions, one would assume that in a case like that of Gerald Gault, where the juvenile appears to have a home, a working mother and father, and an older brother, the Juvenile Judge would have made a careful inquiry and judgment as to the possibility that the boy could be disciplined and dealt with at home, despite his previous transgressions.[41] Indeed, so far as appears in the record before us, except for some conversation with Gerald about his school work and his "wanting to go to . . . Grand Canyon with his father," the points to which the judge directed his attention were little different from those that would be in-

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[40] Cf., however, the conclusions of the D. C. Crime Comm'n Report, pp. 692–693, concerning the inadequacy of the "social study records" upon which the Juvenile Court Judge must make this determination and decide on appropriate treatment.

[41] The Juvenile Judge's testimony at the habeas corpus proceeding is devoid of any meaningful discussion of this. He appears to have centered his attention upon whether Gerald made the phone call and used lewd words. He was impressed by the fact that Gerald was on six months' probation because he was with another boy who allegedly stole a purse—a different sort of offense, sharing the feature that Gerald was "along." And he even referred to a report which he said was not investigated because "there was no accusation" "because of lack of material foundation."

With respect to the possible duty of a trial court to explore alternatives to involuntary commitment in a civil proceeding, cf. *Lake* v. *Cameron*, 124 U. S. App. D. C. 264, 364 F. 2d 657 (1966), which arose under statutes relating to treatment of the mentally ill.

volved in determining any charge of violation of a penal statute.[42] The essential difference between Gerald's case and a normal criminal case is that safeguards available to adults were discarded in Gerald's case. The summary procedure as well as the long commitment was possible because Gerald was 15 years of age instead of over 18.

If Gerald had been over 18, he would not have been subject to Juvenile Court proceedings.[43] For the particular offense immediately involved, the maximum punishment would have been a fine of $5 to $50, or imprisonment in jail for not more than two months. Instead, he was committed to custody for a maximum of six years. If he had been over 18 and had committed an offense to which such a sentence might apply, he would have been entitled to substantial rights under the Constitution of the United States as well as under Arizona's laws and constitution. The United States Constitution would guarantee him rights and protections with respect to arrest, search and seizure, and pretrial interrogation. It would assure him of specific notice of the charges and adequate time to decide his course of action and to prepare his defense. He would be entitled to clear advice that he could be represented by counsel, and, at least if a felony were involved, the State would be required to provide counsel if his parents were unable to afford it. If the court acted on the basis of his confession, careful procedures would be required to assure its voluntariness. If the case went to trial, confrontation and opportunity for cross-examination would be guaranteed. So wide a gulf between the State's treatment of the adult and of the child requires a bridge sturdier than mere

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[42] While appellee's brief suggests that the probation officer made some investigation of Gerald's home life, etc., there is not even a claim that the judge went beyond the point stated in the text.

[43] ARS §§ 8-201, 8-202.

verbiage, and reasons more persuasive than cliché can provide. As Wheeler and Cottrell have put it, "The rhetoric of the juvenile court movement has developed without any necessarily close correspondence to the realities of court and institutional routines." [44]

In *Kent* v. *United States, supra,* we stated that the Juvenile Court Judge's exercise of the power of the state as *parens patriae* was not unlimited. We said that "the admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness." [45] With respect to the waiver by the Juvenile Court to the adult court of jurisdiction over an offense committed by a youth, we said that "there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons." [46] We announced with respect to such waiver proceedings that while "We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment." [47] We reiterate this view, here in connection with a juvenile court adjudication of "delinquency," as a requirement

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[44] Juvenile Delinquency—Its Prevention and Control (Russell Sage Foundation, 1966), p. 35. The gap between rhetoric and reality is also emphasized in the Nat'l Crime Comm'n Report, pp. 80–81.

[45] 383 U. S., at 555.

[46] 383 U. S., at 554. THE CHIEF JUSTICE stated in a recent speech to a conference of the National Council of Juvenile Court Judges, that a juvenile court "must function within the framework of law and . . . in the attainment of its objectives it cannot act with unbridled caprice." Equal Justice for Juveniles, 15 Juvenile Court Judges Journal, No. 3, pp. 14, 15 (1964).

[47] 383 U. S., at 562.

which is part of the Due Process Clause of the Fourteenth Amendment of our Constitution.[48]

We now turn to the specific issues which are presented to us in the present case.

III.

Notice of Charges.

Appellants allege that the Arizona Juvenile Code is unconstitutional or alternatively that the proceedings before the Juvenile Court were constitutionally defective because of failure to provide adequate notice of the hearings. No notice was given to Gerald's parents when he was taken into custody on Monday, June 8. On that night, when Mrs. Gault went to the Detention Home, she was orally informed that there would be a hearing the next afternoon and was told the reason why Gerald was in custody. The only written notice Gerald's parents received at any time was a note on plain paper from Officer Flagg delivered on Thursday or Friday, June 11 or 12, to the effect that the judge had set Monday, June 15, "for further Hearings on Gerald's delinquency."

A "petition" was filed with the court on June 9 by Officer Flagg, reciting only that he was informed and believed that "said minor is a delinquent minor and that it is necessary that some order be made by the Honorable Court for said minor's welfare." The applicable Arizona

[48] The Nat'l Crime Comm'n Report recommends that "Juvenile courts should make fullest feasible use of preliminary conferences to dispose of cases short of adjudication." *Id.*, at 84. See also D. C. Crime Comm'n Report, pp. 662–665. Since this "consent decree" procedure would involve neither adjudication of delinquency nor institutionalization, nothing we say in this opinion should be construed as expressing any views with respect to such procedure. The problems of pre-adjudication treatment of juveniles, and of post-adjudication disposition, are unique to the juvenile process; hence what we hold in this opinion with regard to the procedural requirements at the adjudicatory stage has no necessary applicability to other steps of the juvenile process.

statute provides for a petition to be filed in Juvenile Court, alleging in general terms that the child is "neglected, dependent or delinquent." The statute explicitly states that such a general allegation is sufficient, "without alleging the facts." [49] There is no requirement that the petition be served and it was not served upon, given to, or shown to Gerald or his parents.[50]

The Supreme Court of Arizona rejected appellants' claim that due process was denied because of inadequate notice. It stated that "Mrs. Gault knew the exact nature of the charge against Gerald from the day he was taken to the detention home." The court also pointed out that the Gaults appeared at the two hearings "without objection." The court held that because "the policy of the juvenile law is to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past," advance notice of the specific charges or basis for taking the juvenile into custody and for the hearing is not necessary. It held that the appropriate rule is that "the infant and his parent or guardian will receive a petition only reciting a conclusion of delinquency.[51]" But no later than the initial hearing by the judge, they must be advised of the facts involved in the

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[49] ARS § 8–222 (B).

[50] Arizona's Juvenile Code does not provide for notice of any sort to be given at the commencement of the proceedings to the child or his parents. Its only notice provision is to the effect that if a person other than the parent or guardian is cited to appear, the parent or guardian shall be notified "by personal service" of the time and place of hearing. ARS § 8–224. The procedure for initiating a proceeding, as specified by the statute, seems to require that after a preliminary inquiry by the court, a determination may be made "that formal jurisdiction should be acquired." Thereupon the court may authorize a petition to be filed. ARS § 8–222. It does not appear that this procedure was followed in the present case.

[51] No such petition was served or supplied in the present case.

case. If the charges are denied, they must be given a reasonable period of time to prepare."

We cannot agree with the court's conclusion that adequate notice was given in this case. Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must "set forth the alleged misconduct with particularity." [52] It is obvious, as we have discussed above, that no purpose of shielding the child from the public stigma of knowledge of his having been taken into custody and scheduled for hearing is served by the procedure approved by the court below. The "initial hearing" in the present case was a hearing on the merits. Notice at that time is not timely; and even if there were a conceivable purpose served by the deferral proposed by the court below, it would have to yield to the requirements that the child and his parents or guardian be notified, in writing, of the specific charge or factual allegations to be considered at the hearing, and that such written notice be given at the earliest practicable time, and in any event sufficiently in advance of the hearing to permit preparation. Due process of law requires notice of the sort we have described—that is, notice which would be deemed constitutionally adequate in a civil or criminal proceeding.[53] It does

[52] Nat'l Crime Comm'n Report, p. 87. The Commission observed that "The unfairness of too much informality is . . . reflected in the inadequacy of notice to parents and juveniles about charges and hearings." *Ibid.*

[53] For application of the due process requirement of adequate notice in a criminal context, see, *e. g.*, *Cole* v. *Arkansas*, 333 U. S. 196 (1948); *In re Oliver*, 333 U. S. 257, 273–278 (1948). For application in a civil context, see, *e. g.*, *Armstrong* v. *Manzo*, 380 U. S. 545 (1965); *Mullane* v. *Central Hanover Tr. Co.*, 339 U. S. 306 (1950). Cf. also *Chaloner* v. *Sherman*, 242 U. S. 455 (1917). The Court's discussion in these cases of the right to timely and adequate notice forecloses any contention that the notice approved by the

not allow a hearing to be held in which a youth's freedom and his parents' right to his custody are at stake without giving them timely notice, in advance of the hearing, of the specific issues that they must meet. Nor, in the circumstances of this case, can it reasonably be said that the requirement of notice was waived.[54]

IV.

Right to Counsel.

Appellants charge that the Juvenile Court proceedings were fatally defective because the court did not advise Gerald or his parents of their right to counsel, and proceeded with the hearing, the adjudication of delinquency and the order of commitment in the absence of counsel for the child and his parents or an express waiver of the right thereto. The Supreme Court of Arizona pointed out that "[t]here is disagreement [among the various jurisdictions] as to whether the court must advise the infant

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Arizona Supreme Court, or the notice actually given the Gaults, was constitutionally adequate. See also Antieau, Constitutional Rights in Juvenile Courts, 46 Cornell L. Q. 387, 395 (1961); Paulsen, Fairness to the Juvenile Offender, 41 Minn. L. Rev. 547, 557 (1957). Cf. Standards, pp. 63–65; Procedures and Evidence in the Juvenile Court, A Guidebook for Judges, prepared by the Advisory Council of Judges of the National Council on Crime and Delinquency (1962), pp. 9–23 (and see cases discussed therein).

[54] Mrs. Gault's "knowledge" of the charge against Gerald, and/or the asserted failure to object, does not excuse the lack of adequate notice. Indeed, one of the purposes of notice is to clarify the issues to be considered, and as our discussion of the facts, *supra*, shows, even the Juvenile Court Judge was uncertain as to the precise issues determined at the two "hearings." Since the Gaults had no counsel and were not told of their right to counsel, we cannot consider their failure to object to the lack of constitutionally adequate notice as a waiver of their rights. Because of our conclusion that notice given only at the first hearing is inadequate, we need not reach the question whether the Gaults ever received adequately specific notice even at the June 9 hearing, in light of the fact they were never apprised of the charge of being habitually involved in immoral matters.

that he has a right to counsel." [55] It noted its own decision in *Arizona State Dept. of Public Welfare* v. *Barlow*, 80 Ariz. 249, 296 P. 2d 298 (1956), to the effect "that *the parents* of an infant in a juvenile proceeding cannot be denied representation by counsel of their choosing." (Emphasis added.) It referred to a provision of the Juvenile Code which it characterized as requiring "that the probation officer shall look after the interests of neglected, delinquent and dependent children," including representing their interests in court.[56] The court argued that "The parent and the probation officer may be relied upon to protect the infant's interests." Accordingly it rejected the proposition that "due process requires that an infant have a right to counsel." It said that juvenile courts have the discretion, but not the duty, to allow such representation; it referred specifically to the situation in which the Juvenile Court discerns conflict between the child and his parents as an instance in which this discretion might be exercised. We do not agree. Proba-

[55] For recent cases in the District of Columbia holding that there must be advice of the right to counsel, and to have counsel appointed if necessary, see, *e. g.*, *Shioutakon* v. *District of Columbia*, 98 U. S. App. D. C. 371, 236 F. 2d 666 (1956); *Black* v. *United States*, 122 U. S. App. D. C. 393, 355 F. 2d 104 (1965); *In re Poff*, 135 F. Supp. 224 (D. C. D. C. 1955). Cf. also *In re Long*, 184 So. 2d 861, 862 (1966); *People* v. *Dotson*, 46 Cal. 2d 891, 299 P. 2d 875 (1956).

[56] The section cited by the court, ARS § 8–204–C, reads as follows:

"The probation officer shall have the authority of a peace officer. He shall:

"1. Look after the interests of neglected, delinquent and dependent children of the county.

"2. Make investigations and file petitions.

"3. Be present in court when cases are heard concerning children and represent their interests.

"4. Furnish the court information and assistance as it may require.

"5. Assist in the collection of sums ordered paid for the support of children.

"6. Perform other acts ordered by the court."

tion officers, in the Arizona scheme, are also arresting officers. They initiate proceedings and file petitions which they verify, as here, alleging the delinquency of the child; and they testify, as here, against the child. And here the probation officer was also superintendent of the Detention Home. The probation officer cannot act as counsel for the child. His role in the adjudicatory hearing, by statute and in fact, is as arresting officer and witness against the child. Nor can the judge represent the child. There is no material difference in this respect between adult and juvenile proceedings of the sort here involved. In adult proceedings, this contention has been foreclosed by decisions of this Court.[57] A proceeding where the issue is whether the child will be found to be "delinquent" and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law,[58] to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child "requires the guiding hand of counsel at every step in the proceedings against him." [59] Just as in *Kent* v. *United States, supra,* at 561–562, we indicated our agreement with the United States Court of Appeals for the District of Columbia Circuit that the assistance of counsel is essential for purposes of waiver proceedings, so we hold now that it is equally essential for the determination of delinquency, carrying with it the awesome prospect of incarceration

[57] *Powell* v. *Alabama,* 287 U. S. 45, 61 (1932); *Gideon* v. *Wainwright,* 372 U. S. 335 (1963).

[58] In the present proceeding, for example, although the Juvenile Judge believed that Gerald's telephone conversation was within the condemnation of ARS § 13–377, he suggested some uncertainty because the statute prohibits the use of vulgar language "in the presence or hearing of" a woman or child.

[59] *Powell* v. *Alabama,* 287 U. S. 45, 69 (1932).

in a state institution until the juvenile reaches the age of 21.[60]

During the last decade, court decisions,[61] experts,[62] and legislatures[63] have demonstrated increasing recognition of this view. In at least one-third of the States, statutes

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[60] This means that the commitment, in virtually all cases, is for a minimum of three years since jurisdiction of juvenile courts is usually limited to age 18 and under.

[61] See cases cited in n. 55, *supra*.

[62] See, *e. g.*, Schinitsky, 17 The Record 10 (N. Y. City Bar Assn. 1962); Paulsen, Fairness to the Juvenile Offender, 41 Minn. L. Rev. 547, 568–573 (1957); Antieau, Constitutional Rights in Juvenile Courts, 46 Cornell L. Q. 387, 404–407 (1961); Paulsen, Kent v. United States: The Constitutional Context of Juvenile Cases, 1966 Sup. Ct. Rev. 167, 187–189; Ketcham, The Legal Renaissance in the Juvenile Court, 60 Nw. U. L. Rev. 585 (1965); Elson, Juvenile Courts & Due Process, in Justice for the Child (Rosenheim ed.) 95, 103–105 (1962); Note, Rights and Rehabilitation in the Juvenile Courts, 67 Col. L. Rev. 281, 321–327 (1967). See also Nat'l Probation and Parole Assn., Standard Family Court Act (1959) § 19, and Standard Juvenile Court Act (1959) § 19, in 5 NPPA Journal 99, 137, 323, 367 (1959) (hereinafter cited as Standard Family Court Act and Standard Juvenile Court Act, respectively).

[63] Only a few state statutes require advice of the right to counsel and to have counsel appointed. See N. Y. Family Court Act §§ 241, 249, 728, 741; Calif. Welf. & Inst'ns Code §§ 633, 634, 659, 700 (1966) (appointment is mandatory only if conduct would be a felony in the case of an adult); Minn. Stat. Ann. § 260.155 (2) (1966 Supp.) (see Comment of Legislative Commission accompanying this section); District of Columbia Legal Aid Act, D. C. Code Ann. § 2–2202 (1961) (Legal Aid Agency "shall make attorneys available to represent indigents . . . in proceedings before the juvenile court . . . ." See *Black* v. *United States*, 122 U. S. App. D. C. 393, 395–396, 355 F. 2d 104, 106–107 (1965), construing this Act as providing a right to appointed counsel and to be informed of that right). Other state statutes allow appointment on request, or in some classes of cases, or in the discretion of the court, etc. The state statutes are collected and classified in Riederer, The Role of Counsel in the Juvenile Court, 2 J. Fam. Law 16, 19–20 (1962), which, however, does not treat the statutes cited above. See also Note, Rights and Rehabilitation in the Juvenile Courts, 67 Col. L. Rev. 281, 321–322 (1967).

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now provide for the right of representation by retained counsel in juvenile delinquency proceedings, notice of the right, or assignment of counsel, or a combination of these. In other States, court rules have similar provisions.[64]

The President's Crime Commission has recently recommended that in order to assure "procedural justice for the child," it is necessary that "Counsel . . . be appointed as a matter of course wherever coercive action is a possibility, without requiring any affirmative choice by child or parent." [65] As stated by the authoritative "Standards

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[64] Skoler & Tenney, Attorney Representation in Juvenile Court, 4 J. Fam. Law 77, 95–96 (1964); Riederer, The Role of Counsel in the Juvenile Court, 2 J. Fam. Law 16 (1962).

Recognition of the right to counsel involves no necessary interference with the special purposes of juvenile court procedures; indeed, it seems that counsel can play an important role in the process of rehabilitation. See Note, Rights and Rehabilitation in the Juvenile Courts, 67 Col. L. Rev. 281, 324–327 (1967).

[65] Nat'l Crime Comm'n Report, pp. 86–87. The Commission's statement of its position is very forceful:

"The Commission believes that no single action holds more potential for achieving procedural justice for the child in the juvenile court than provision of counsel. The presence of an independent legal representative of the child, or of his parent, is the keystone of the whole structure of guarantees that a minimum system of procedural justice requires. The rights to confront one's accusers, to cross-examine witnesses, to present evidence and testimony of one's own, to be unaffected by prejudicial and unreliable evidence, to participate meaningfully in the dispositional decision, to take an appeal have substantial meaning for the overwhelming majority of persons brought before the juvenile court only if they are provided with competent lawyers who can invoke those rights effectively. The most informal and well-intentioned of judicial proceedings are technical; few adults without legal training can influence or even understand them; certainly children cannot. Papers are drawn and charges expressed in legal language. Events follow one another in a manner that appears arbitrary and confusing to the uninitiated. Decisions, unexplained, appear too official to challenge. But with lawyers come records of proceedings; records make possible appeals

for Juvenile and Family Courts," published by the Children's Bureau of the United States Department of Health, Education, and Welfare:

> "As a component part of a fair hearing required by due process guaranteed under the 14th amendment, notice of the right to counsel should be required at all hearings and counsel provided upon request when the family is financially unable to employ counsel." Standards, p. 57.

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which, even if they do not occur, impart by their possibility a healthy atmosphere of accountability.

"Fears have been expressed that lawyers would make juvenile court proceedings adversary. No doubt this is partly true, but it is partly desirable. Informality is often abused. The juvenile courts deal with cases in which facts are disputed and in which, therefore, rules of evidence, confrontation of witnesses, and other adversary procedures are called for. They deal with many cases involving conduct that can lead to incarceration or close supervision for long periods, and therefore juveniles often need the same safeguards that are granted to adults. And in all cases children need advocates to speak for them and guard their interests, particularly when disposition decisions are made. It is the disposition stage at which the opportunity arises to offer individualized treatment plans and in which the danger inheres that the court's coercive power will be applied without adequate knowledge of the circumstances.

"Fears also have been expressed that the formality lawyers would bring into juvenile court would defeat the therapeutic aims of the court. But informality has no necessary connection with therapy; it is a device that has been used to approach therapy, and it is not the only possible device. It is quite possible that in many instances lawyers, for all their commitment to formality, could do more to further therapy for their clients than can the small, overworked social staffs of the courts. . . .

"The Commission believes it is essential that counsel be appointed by the juvenile court for those who are unable to provide their own. Experience under the prevailing systems in which children are free to seek counsel of their choice reveals how empty of meaning the right is for those typically the subjects of juvenile court proceedings. Moreover, providing counsel only when the child is sophisticated

This statement was "reviewed" by the National Council of Juvenile Court Judges at its 1965 Convention and they "found no fault" with it.[66] The New York Family Court Act contains the following statement:

> "This act declares that minors have a right to the assistance of counsel of their own choosing or of law guardians[67] in neglect proceedings under article three and in proceedings to determine juvenile delinquency and whether a person is in need of supervision under article seven. This declaration is based on a finding that counsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition." [68]

The Act provides that "At the commencement of any hearing" under the delinquency article of the statute, the juvenile and his parent shall be advised of the juvenile's

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enough to be aware of his need and to ask for one or when he fails to waive his announced right [is] not enough, as experience in numerous jurisdictions reveals.

"The Commission recommends:

"COUNSEL SHOULD BE APPOINTED AS A MATTER OF COURSE WHEREVER COERCIVE ACTION IS A POSSIBILITY, WITHOUT REQUIRING ANY AFFIRMATIVE CHOICE BY CHILD OR PARENT."

[66] Lehman, A Juvenile's Right to Counsel in A Delinquency Hearing, 17 Juvenile Court Judge's Journal 53 (1966). In an interesting review of the 1966 edition of the Children's Bureau's "Standards," Rosenheim, Standards for Juvenile and Family Courts: Old Wine in a New Bottle, 1 Fam. L. Q. 25, 29 (1967), the author observes that "The 'Standards' of 1966, just like the 'Standards' of 1954, are valuable precisely because they represent a diligent and thoughtful search for an accommodation between the aspirations of the founders of the juvenile court and the grim realities of life against which, in part, the due process of criminal and civil law offers us protection."

[67] These are lawyers designated, as provided by the statute, to represent minors. N. Y. Family Court Act § 242.

[68] N. Y. Family Court Act § 241.

"right to be represented by counsel chosen by him or his parent . . . or by a law guardian assigned by the court . . . ." [69] The California Act (1961) also requires appointment of counsel.[70]

We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.

At the habeas corpus proceeding, Mrs. Gault testified that she knew that she could have appeared with counsel

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[69] N. Y. Family Court Act § 741. For accounts of New York practice under the new procedures, see Isaacs, The Role of the Lawyer in Representing Minors in the New Family Court, 12 Buffalo L. Rev. 501 (1963); Dembitz, Ferment and Experiment in New York: Juvenile Cases in the New Family Court, 48 Cornell L. Q. 499, 508–512 (1963). Since introduction of the law guardian system in September of 1962, it is stated that attorneys are present in the great majority of cases. Harvard Law Review Note, p. 796. See New York Judicial Conference, Twelfth Annual Report, pp. 288–291 (1967), for detailed statistics on representation of juveniles in New York. For the situation before 1962, see Schinitsky, The Role of the Lawyer in Children's Court, 17 The Record 10 (N. Y. City Bar Assn. 1962). In the District of Columbia, where statute and court decisions require that a lawyer be appointed if the family is unable to retain counsel, see n. 63, *supra*, and where the juvenile and his parents are so informed at the initial hearing, about 85% to 90% do not choose to be represented and sign a written waiver form. D. C. Crime Comm'n Report, p. 646. The Commission recommends adoption in the District of Columbia of a "law guardian" system similar to that of New York, with more effective notification of the right to appointed counsel, in order to eliminate the problems of procedural fairness, accuracy of fact-finding, and appropriateness of disposition which the absence of counsel in so many juvenile court proceedings involves. *Id.*, at 681–685.

[70] See n. 63, *supra*.

at the juvenile hearing. This knowledge is not a waiver of the right to counsel which she and her juvenile son had, as we have defined it. They had a right expressly to be advised that they might retain counsel and to be confronted with the need for specific consideration of whether they did or did not choose to waive the right. If they were unable to afford to employ counsel, they were entitled in view of the seriousness of the charge and the potential commitment, to appointed counsel, unless they chose waiver. Mrs. Gault's knowledge that she could employ counsel was not an "intentional relinquishment or abandonment" of a fully known right.[71]

V.

Confrontation, Self-Incrimination, Cross-Examination.

Appellants urge that the writ of habeas corpus should have been granted because of the denial of the rights of confrontation and cross-examination in the Juvenile Court hearings, and because the privilege against self-incrimination was not observed. The Juvenile Court Judge testified at the habeas corpus hearing that he had proceeded on the basis of Gerald's admissions at the two hearings. Appellants attack this on the ground that the admissions were obtained in disregard of the privilege against self-incrimination.[72] If the confession is disregarded, appellants argue that the delinquency conclusion, since it was fundamentally based on a finding that Gerald had made lewd remarks during the phone call to Mrs. Cook, is fatally defective for failure to accord the rights of confrontation and cross-examination which the Due Process Clause of the Fourteenth Amendment of the

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[71] *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938); *Carnley* v. *Cochran*, 369 U. S. 506 (1962); *United States ex rel. Brown* v. *Fay*, 242 F. Supp. 273 (D. C. S. D. N. Y. 1965).

[72] The privilege is applicable to state proceedings. *Malloy* v. *Hogan*, 378 U. S. 1 (1964).

Federal Constitution guarantees in state proceedings generally.[73]

Our first question, then, is whether Gerald's admission was improperly obtained and relied on as the basis of decision, in conflict with the Federal Constitution. For this purpose, it is necessary briefly to recall the relevant facts.

Mrs. Cook, the complainant, and the recipient of the alleged telephone call, was not called as a witness. Gerald's mother asked the Juvenile Court Judge why Mrs. Cook was not present and the judge replied that "she didn't have to be present." So far as appears, Mrs. Cook was spoken to only once, by Officer Flagg, and this was by telephone. The judge did not speak with her on any occasion. Gerald had been questioned by the probation officer after having been taken into custody. The exact circumstances of this questioning do not appear but any admissions Gerald may have made at this time do not appear in the record.[74] Gerald was also questioned by the Juvenile Court Judge at each of the two hearings. The judge testified in the habeas corpus proceeding that Gerald admitted making "some of the lewd statements . . . [but not] any of the more serious lewd statements." There was conflict and uncertainty among the witnesses at the habeas corpus proceeding—the Juvenile Court Judge, Mr. and Mrs. Gault, and the probation officer—as to what Gerald did or did not admit.

We shall assume that Gerald made admissions of the sort described by the Juvenile Court Judge, as quoted above. Neither Gerald nor his parents were advised that

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[73] *Pointer* v. *Texas*, 380 U. S. 400 (1965); *Douglas* v. *Alabama*, 380 U. S. 415 (1965).

[74] For this reason, we cannot consider the status of Gerald's alleged admissions to the probation officers. Cf., however, Comment, *Miranda* Guarantees in the California Juvenile Court, 7 Santa Clara Lawyer 114 (1966).

he did not have to testify or make a statement, or that an incriminating statement might result in his commitment as a "delinquent."

The Arizona Supreme Court rejected appellants' contention that Gerald had a right to be advised that he need not incriminate himself. It said: "We think the necessary flexibility for individualized treatment will be enhanced by a rule which does not require the judge to advise the infant of a privilege against self-incrimination."

In reviewing this conclusion of Arizona's Supreme Court, we emphasize again that we are here concerned only with a proceeding to determine whether a minor is a "delinquent" and which may result in commitment to a state institution. Specifically, the question is whether, in such a proceeding, an admission by the juvenile may be used against him in the absence of clear and unequivocal evidence that the admission was made with knowledge that he was not obliged to speak and would not be penalized for remaining silent. In light of *Miranda* v. *Arizona*, 384 U. S. 436 (1966), we must also consider whether, if the privilege against self-incrimination is available, it can effectively be waived unless counsel is present or the right to counsel has been waived.

It has long been recognized that the eliciting and use of confessions or admissions require careful scrutiny. Dean Wigmore states:

> "The ground of distrust of confessions made in certain situations is, in a rough and indefinite way, judicial experience. There has been no careful collection of statistics of untrue confessions, nor has any great number of instances been even loosely reported . . . but enough have been verified to fortify the conclusion, based on ordinary observation of human conduct, that under certain stresses a person, especially one of defective mentality or peculiar

temperament, may falsely acknowledge guilt. This possibility arises wherever the innocent person is placed in such a situation that the untrue acknowledgment of guilt is at the time the more promising of two alternatives between which he is obliged to choose; that is, he chooses any risk that may be in falsely acknowledging guilt, in preference to some worse alternative associated with silence.

. . . . .

"The principle, then, upon which a confession may be excluded is that it is, under certain conditions, *testimonially untrustworthy* . . . . [T]he essential feature is that the principle of exclusion is a testimonial one, analogous to the other principles which exclude narrations as untrustworthy . . . ." [75]

This Court has emphasized that admissions and confessions of juveniles require special caution. In *Haley* v. *Ohio*, 332 U. S. 596, where this Court reversed the conviction of a 15-year-old boy for murder, MR. JUSTICE DOUGLAS said:

"What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal from midnight

[75] 3 Wigmore, Evidence § 822 (3d ed. 1940).

> to 5 a. m. But we cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him. No friend stood at the side of this 15-year-old boy as the police, working in relays, questioned him hour after hour, from midnight until dawn. No lawyer stood guard to make sure that the police went so far and no farther, to see to it that they stopped short of the point where he became the victim of coercion. No counsel or friend was called during the critical hours of questioning." [76]

In *Haley*, as we have discussed, the boy was convicted in an adult court, and not a juvenile court. In notable decisions, the New York Court of Appeals and the Supreme Court of New Jersey have recently considered decisions of Juvenile Courts in which boys have been adjudged "delinquent" on the basis of confessions obtained in circumstances comparable to those in *Haley*. In both instances, the State contended before its highest tribunal that constitutional requirements governing inculpatory statements applicable in adult courts do not apply to juvenile proceedings. In each case, the State's contention was rejected, and the juvenile court's determination of delinquency was set aside on the grounds of inadmissibility of the confession. *In the Matters of Gregory W. and Gerald S.*, 19 N. Y. 2d 55, 224 N. E. 2d 102 (1966) (opinion by Keating, J.), and *In the Interests of Carlo and Stasilowicz*, 48 N. J. 224, 225 A. 2d 110 (1966) (opinion by Proctor, J.).

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[76] 332 U. S., at 599–600 (opinion of MR. JUSTICE DOUGLAS, joined by JUSTICES BLACK, Murphy and Rutledge; Justice Frankfurter concurred in a separate opinion).

The privilege against self-incrimination is, of course, related to the question of the safeguards necessary to assure that admissions or confessions are reasonably trustworthy, that they are not the mere fruits of fear or coercion, but are reliable expressions of the truth. The roots of the privilege are, however, far deeper. They tap the basic stream of religious and political principle because the privilege reflects the limits of the individual's attornment to the state and—in a philosophical sense—insists upon the equality of the individual and the state.[77] In other words, the privilege has a broader and deeper thrust than the rule which prevents the use of confessions which are the product of coercion because coercion is thought to carry with it the danger of unreliability. One of its purposes is to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction.[78]

It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children. The language of the Fifth Amendment, applicable to the States by operation of the Fourteenth Amendment, is unequivocal and without exception. And the scope of the privilege is comprehensive. As MR. JUSTICE WHITE, concurring, stated in *Murphy* v. *Waterfront Commission*, 378 U. S. 52, 94 (1964):

> "The privilege can be claimed in *any proceeding*, be it criminal or civil, administrative or judicial, investigatory or adjudicatory . . . it protects *any dis-*

[77] See Fortas, The Fifth Amendment, 25 Cleveland Bar Assn. Journal 91 (1954).

[78] See *Rogers* v. *Richmond*, 365 U. S. 534 (1961); *Culombe* v. *Connecticut*, 367 U. S. 568 (1961) (opinion of Mr. Justice Frankfurter, joined by MR. JUSTICE STEWART); *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

closures which the witness may reasonably apprehend *could be used in a criminal prosecution or which could lead to other evidence that might be so used.*" [79] (Emphasis added.)

With respect to juveniles, both common observation and expert opinion emphasize that the "distrust of confessions made in certain situations" to which Dean Wigmore referred in the passage quoted *supra*, at 44–45, is imperative in the case of children from an early age through adolescence. In New York, for example, the recently enacted Family Court Act provides that the juvenile and his parents must be advised at the start of the hearing of his right to remain silent.[80] The New York statute also provides that the police must attempt to communicate with the juvenile's parents before questioning him,[81] and that absent "special circumstances" a confession may not be obtained from a child prior to notifying his parents or relatives and releasing the child either to them or to the Family Court.[82] In *In the Matters of Gregory W. and Gerald S.*, referred to above, the New York Court of Appeals held that the privilege against self-incrimination applies in juvenile delinquency cases and requires the exclusion of involuntary confessions, and that *People* v. *Lewis*, 260 N. Y. 171, 183 N. E. 353

[79] See also *Malloy* v. *Hogan*, 378 U. S. 1 (1964); *McCarthy* v. *Arndstein*, 266 U. S. 34, 40 (1924).

[80] N. Y. Family Court Act § 741.

[81] N. Y. Family Court Act § 724 (a). In *In the Matter of Williams*, 49 Misc. 2d 154, 267 N. Y. S. 2d 91 (1966), the New York Family Court held that "The failure of the police to notify this child's parents that he had been taken into custody, if not alone sufficient to render his confession inadmissible, is germane on the issue of its voluntary character . . . ." *Id.*, at 165, 267 N. Y. S. 2d, at 106. The confession was held involuntary and therefore inadmissible.

[82] N. Y. Family Court Act § 724 (as amended 1963, see Supp. 1966). See *In the Matter of Addison*, 20 App. Div. 2d 90, 245 N. Y. S. 2d 243 (1963).

(1932), holding the contrary, had been specifically overruled by statute.

The authoritative "Standards for Juvenile and Family Courts" concludes that, "Whether or not transfer to the criminal court is a possibility, certain procedures should always be followed. Before being interviewed [by the police], the child and his parents should be informed of his right to have legal counsel present and to refuse to answer questions or be fingerprinted [83] if he should so decide." [84]

Against the application to juveniles of the right to silence, it is argued that juvenile proceedings are "civil" and not "criminal," and therefore the privilege should not apply. It is true that the statement of the privilege in the Fifth Amendment, which is applicable to the States by reason of the Fourteenth Amendment, is that no person "shall be compelled in any *criminal case* to be a witness against himself." However, it is also clear that the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites. The privilege may, for example, be claimed in a civil or administrative proceeding, if the statement is or may be inculpatory.[85]

It would be entirely unrealistic to carve out of the Fifth Amendment all statements by juveniles on the ground that these cannot lead to "criminal" involvement. In the first place, juvenile proceedings to determine "delinquency," which may lead to commitment to a state institution, must be regarded as "criminal" for purposes of the privilege against self-incrimination. To hold

[83] The issues relating to fingerprinting of juveniles are not presented here, and we express no opinion concerning them.

[84] Standards, p. 49.

[85] See n. 79, *supra*, and accompanying text.

otherwise would be to disregard substance because of the feeble enticement of the "civil" label-of-convenience which has been attached to juvenile proceedings. Indeed, in over half of the States, there is not even assurance that the juvenile will be kept in separate institutions, apart from adult "criminals." In those States juveniles may be placed in or transferred to adult penal institutions [86] after having been found "delinquent" by a juvenile court. For this purpose, at least, commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called "criminal" or "civil." And our Constitution guarantees that no person shall be "compelled" to be a witness against himself when he is threatened with deprivation of his liberty—a command which this Court has broadly applied and generously implemented in accordance with the teaching of the history of the privilege and its great office in mankind's battle for freedom.[87]

In addition, apart from the equivalence for this purpose of exposure to commitment as a juvenile delinquent and exposure to imprisonment as an adult offender, the fact of the matter is that there is little or no assurance in Arizona, as in most if not all of the States, that a juvenile apprehended and interrogated by the police or even by the Juvenile Court itself will remain outside of the reach of adult courts as a consequence of the offense for which he has been taken into custody. In Arizona, as in other States, provision is made for Juvenile Courts to relinquish

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[86] Delinquent Children in Penal Institutions, Children's Bureau Pub. No. 415—1964, p. 1.

[87] See, *e. g.*, *Miranda* v. *Arizona*, 384 U. S. 436 (1966); *Garrity* v. *New Jersey*, 385 U. S. 493 (1967); *Spevack* v. *Klein*, 385 U. S. 511 (1967); *Haynes* v. *Washington*, 373 U. S. 503 (1963); *Culombe* v. *Connecticut*, 367 U. S. 568 (1961); *Rogers* v. *Richmond*, 365 U. S. 534 (1961); *Malloy* v. *Hogan*, 378 U. S. 1 (1964); *Griffin* v. *California*, 380 U. S. 609 (1965).

or waive jurisdiction to the ordinary criminal courts.[88] In the present case, when Gerald Gault was interrogated concerning violation of a section of the Arizona Criminal Code, it could not be certain that the Juvenile Court Judge would decide to "suspend" criminal prosecution in court for adults by proceeding to an adjudication in Juvenile Court.[89]

It is also urged, as the Supreme Court of Arizona here asserted, that the juvenile and presumably his parents should not be advised of the juvenile's right to silence because confession is good for the child as the commencement of the assumed therapy of the juvenile court process, and he should be encouraged to assume an attitude of trust and confidence toward the officials of the juvenile process. This proposition has been subjected to widespread challenge on the basis of current reappraisals of the rhetoric and realities of the handling of juvenile offenders.

In fact, evidence is accumulating that confessions by juveniles do not aid in "individualized treatment," as the court below put it, and that compelling the child to answer questions, without warning or advice as to his right to remain silent, does not serve this or any other good purpose. In light of the observations of Wheeler and Cottrell,[90] and others, it seems probable that where children are induced to confess by "paternal" urgings on the part of officials and the confession is then fol-

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[88] Arizona Constitution, Art. 6, § 15 (as amended 1960); ARS §§ 8–223, 8–228 (A); Harvard Law Review Note, p. 793. Because of this possibility that criminal jurisdiction may attach it is urged that ". . . all of the procedural safeguards in the criminal law should be followed." Standards, p. 49. Cf. *Harling* v. *United States*, 111 U. S. App. D. C. 174, 295 F. 2d 161 (1961).

[89] ARS § 8–228 (A).

[90] Juvenile Delinquency—Its Prevention and Control (Russell Sage Foundation, 1966).

lowed by disciplinary action, the child's reaction is likely to be hostile and adverse—the child may well feel that he has been led or tricked into confession and that despite his confession, he is being punished.[91]

Further, authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of "confessions" by children. This Court's observations in *Haley* v. *Ohio* are set forth above. The recent decision of the New York Court of Appeals referred to above, *In the Matters of Gregory W. and Gerald S.*, deals with a dramatic and, it is to be hoped, extreme example. Two 12-year-old Negro boys were taken into custody for the brutal assault and rape of two aged domestics, one of whom died as the result of the attack. One of the boys was schizophrenic and had been locked in the security ward of a mental institution at the time of the attacks. By a process that may best be described as bizarre, his confession was obtained by the police. A psychiatrist testified that the boy would admit "whatever he thought was expected so that he could get out of the immediate situation." The other 12-year-old also "confessed." Both confessions were in specific detail, albeit they contained various inconsistencies. The Court of Appeals, in an opinion by Keating, J., concluded that the confessions were products of the will of the police instead of the boys. The confessions were therefore held involuntary and the order of the Appellate Division affirming the order of the Family Court adjudging the defendants to be juvenile delinquents was reversed.

A similar and equally instructive case has recently been decided by the Supreme Court of New Jersey. *In the Interests of Carlo and Stasilowicz, supra.* The body of a 10-year-old girl was found. She had been strangled. Neighborhood boys who knew the girl were questioned.

[91] *Id.*, at 33. See also the other materials cited in n. 37, *supra.*

The two appellants, aged 13 and 15, confessed to the police, with vivid detail and some inconsistencies. At the Juvenile Court hearing, both denied any complicity in the killing. They testified that their confessions were the product of fear and fatigue due to extensive police grilling. The Juvenile Court Judge found that the confessions were voluntary and admissible. On appeal, in an extensive opinion by Proctor, J., the Supreme Court of New Jersey reversed. It rejected the State's argument that the constitutional safeguard of voluntariness governing the use of confessions does not apply in proceedings before the Juvenile Court. It pointed out that under New Jersey court rules, juveniles under the age of 16 accused of committing a homicide are tried in a proceeding which "has all of the appurtenances of a criminal trial," including participation by the county prosecutor, and requirements that the juvenile be provided with counsel, that a stenographic record be made, etc. It also pointed out that under New Jersey law, the confinement of the boys after reaching age 21 could be extended until they had served the maximum sentence which could have been imposed on an adult for such a homicide, here found to be second-degree murder carrying up to 30 years' imprisonment.[92] The court concluded that the confessions were involuntary, stressing that the boys, contrary to statute, were placed in the police station and there interrogated; [93] that the parents of both boys were not allowed to see them while they

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[92] N. J. Rev. Stat. § 2A:4–37 (b)(2) (Supp. 1966); N. J. Rev. Stat. § 2A:113–4.

[93] N. J. Rev. Stat. § 2A:4–32–33. The court emphasized that the "frightening atmosphere" of a police station is likely to have "harmful effects on the mind and will of the boy," citing *In the Matter of Rutane*, 37 Misc. 2d 234, 234 N. Y. S. 2d 777 (Fam. Ct. Kings County, 1962).

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were being interrogated; [94] that inconsistencies appeared among the various statements of the boys and with the objective evidence of the crime; and that there were protracted periods of questioning. The court noted the State's contention that both boys were advised of their constitutional rights before they made their statements, but it held that this should not be given "significant weight in our determination of voluntariness." [95] Accordingly, the judgment of the Juvenile Court was reversed.

In a recent case before the Juvenile Court of the District of Columbia, Judge Ketcham rejected the proffer of evidence as to oral statements made at police headquarters by four juveniles who had been taken into custody for alleged involvement in an assault and attempted robbery. *In the Matter of Four Youths,* Nos. 28–776–J, 28–778–J, 28–783–J, 28–859–J, Juvenile Court of the District of Columbia, April 7, 1961. The court explicitly stated that it did not rest its decision on a showing that

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[94] The court held that this alone might be enough to show that the confessions were involuntary "even though, as the police testified, the boys did not wish to see their parents" (citing *Gallegos* v. *Colorado,* 370 U. S. 49 (1962)).

[95] The court quoted the following passage from *Haley* v. *Ohio, supra,* at 601:

"But we are told that this boy was advised of his constitutional rights before he signed the confession and that, knowing them, he nevertheless confessed. That assumes, however, that a boy of fifteen, without aid of counsel, would have a full appreciation of that advice and that on the facts of this record he had a freedom of choice. We cannot indulge those assumptions. Moreover, we cannot give any weight to recitals which merely formalize constitutional requirements. Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them. They may not become a cloak for inquisitorial practices and make an empty form of the due process of law for which free men fought and died to obtain."

the statements were involuntary, but because they were untrustworthy. Judge Ketcham said:

> "Simply stated, the Court's decision in this case rests upon the considered opinion—after nearly four busy years on the Juvenile Court bench during which the testimony of thousands of such juveniles has been heard—that the statements of adolescents under 18 years of age who are arrested and charged with violations of law are frequently untrustworthy and often distort the truth."

We conclude that the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults. We appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique—but not in principle—depending upon the age of the child and the presence and competence of parents. The participation of counsel will, of course, assist the police, Juvenile Courts and appellate tribunals in administering the privilege. If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.[96]

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[96] The N. Y. Family Court Act § 744 (b) provides that "an uncorroborated confession made out of court by a respondent is not sufficient" to constitute the required "preponderance of the evidence."

See *United States* v. *Morales*, 233 F. Supp. 160 (D. C. Mont. 1964), holding a confession inadmissible in proceedings under the Federal Juvenile Delinquency Act (18 U. S. C. § 5031 *et seq.*) because, in the circumstances in which it was made, the District Court could

The "confession" of Gerald Gault was first obtained by Officer Flagg, out of the presence of Gerald's parents, without counsel and without advising him of his right to silence, as far as appears. The judgment of the Juvenile Court was stated by the judge to be based on Gerald's admissions in court. Neither "admission" was reduced to writing, and, to say the least, the process by which the "admissions" were obtained and received must be characterized as lacking the certainty and order which are required of proceedings of such formidable consequences.[97] Apart from the "admissions," there was nothing upon which a judgment or finding might be based. There was no sworn testimony. Mrs. Cook, the complainant, was not present. The Arizona Supreme Court held that "sworn testimony must be required of all witnesses including police officers, probation officers and others who are part of or officially related to the juvenile court structure." We hold that this is not enough. No reason is suggested or appears for a different rule in respect of sworn testimony in juvenile courts than in adult tribunals. Absent a valid confession adequate to support the determination of the Juvenile Court, confrontation and sworn testimony by witnesses available for cross-examination were essential for a finding of "delinquency" and an order committing Gerald to a state institution for a maximum of six years.

The recommendations in the Children's Bureau's "Standards for Juvenile and Family Courts" are in general accord with our conclusions. They state that testimony should be under oath and that only competent, material and relevant evidence under rules applicable

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not conclude that it "was freely made while Morales was afforded all of the requisites of due process required in the case of a sixteen year old boy of his experience." *Id.*, at 170.

[97] Cf. *Jackson* v. *Denno*, 378 U. S. 368 (1964); *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

to civil cases should be admitted in evidence.[98] The New York Family Court Act contains a similar provision.[99]

As we said in *Kent* v. *United States*, 383 U. S. 541, 554 (1966), with respect to waiver proceedings, "there is no place in our system of law for reaching a result of such tremendous consequences without ceremony . . . ." We now hold that, absent a valid confession, a determination of delinquency and an order of commitment to a state institution cannot be sustained in the absence of sworn testimony subjected to the opportunity for cross-examination in accordance with our law and constitutional requirements.

VI.

Appellate Review and Transcript of Proceedings.

Appellants urge that the Arizona statute is unconstitutional under the Due Process Clause because, as construed by its Supreme Court, "there is no right of appeal

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[98] Standards, pp. 72–73. The Nat'l Crime Comm'n Report concludes that "the evidence admissible at the adjudicatory hearing should be so limited that findings are not dependent upon or unduly influenced by hearsay, gossip, rumor, and other unreliable types of information. To minimize the danger that adjudication will be affected by inappropriate considerations, social investigation reports should not be made known to the judge in advance of adjudication." *Id.*, at 87 (bold face eliminated). See also Note, Rights and Rehabilitation in the Juvenile Courts, 67 Col. L. Rev. 281, 336 (1967): "At the adjudication stage, the use of clearly incompetent evidence in order to prove the youth's involvement in the alleged misconduct . . . is not justifiable. Particularly in delinquency cases, where the issue of fact is the commission of a crime, the introduction of hearsay—such as the report of a policeman who did not witness the events—contravenes the purposes underlying the sixth amendment right of confrontation." (Footnote omitted.)

[99] N. Y. Family Court Act § 744 (a). See also Harvard Law Review Note, p. 795. Cf. *Willner* v. *Committee on Character*, 373 U. S. 96 (1963).

from a juvenile court order . . . ." The court held that there is no right to a transcript because there is no right to appeal and because the proceedings are confidential and any record must be destroyed after a prescribed period of time.[100] Whether a transcript or other recording is made, it held, is a matter for the discretion of the juvenile court.

This Court has not held that a State is required by the Federal Constitution "to provide appellate courts or a right to appellate review at all." [101] In view of the fact that we must reverse the Supreme Court of Arizona's affirmance of the dismissal of the writ of habeas corpus for other reasons, we need not rule on this question in the present case or upon the failure to provide a transcript or recording of the hearings—or, indeed, the failure of the Juvenile Judge to state the grounds for his conclusion. Cf. *Kent* v. *United States, supra,* at 561, where we said, in the context of a decision of the juvenile court waiving jurisdiction to the adult court, which by local law, was permissible: ". . . it is incumbent upon the Juvenile Court to accompany its waiver order with a statement of the reasons or considerations therefor." As the present case illustrates, the consequences of failure to provide an appeal, to record the proceedings, or to make findings or state the grounds for the juvenile court's conclusion may be to throw a burden upon the machinery for habeas corpus, to saddle the reviewing process with the burden of attempting to reconstruct a record, and to impose upon the Juvenile Judge the unseemly duty of testifying under cross-examination as to the events that transpired in the hearings before him.[102]

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[100] ARS § 8-238.

[101] *Griffin* v. *Illinois,* 351 U. S. 12, 18 (1956).

[102] "Standards for Juvenile and Family Courts" recommends "written findings of fact, some form of record of the hearing" "and the right to appeal." Standards, p. 8. It recommends verbatim record-

1 BLACK, J., concurring.

For the reasons stated, the judgment of the Supreme Court of Arizona is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK, concurring.

The juvenile court laws of Arizona and other States, as the Court points out, are the result of plans promoted by humane and forward-looking people to provide a system of courts, procedures, and sanctions deemed to be less harmful and more lenient to children than to adults. For this reason such state laws generally provide less formal and less public methods for the trial of children. In line with this policy, both courts and legislators have shrunk back from labeling these laws as "criminal" and have preferred to call them "civil." This, in part, was to prevent the full application to juvenile court cases of the Bill of Rights safeguards, including notice as provided in the Sixth Amendment,[1] the right to counsel guaranteed by the Sixth,[2] the right against self-

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ing of the hearing by stenotypist or mechanical recording (p. 76) and urges that the judge make clear to the child and family their right to appeal (p. 78). See also, Standard Family Court Act §§ 19, 24, 28; Standard Juvenile Court Act §§ 19, 24, 28. The Harvard Law Review Note, p. 799, states that "The result [of the infrequency of appeals due to absence of record, indigency, etc.] is that juvenile court proceedings are largely unsupervised." The Nat'l Crime Comm'n Report observes, p. 86, that "records make possible appeals which, even if they do not occur, impart by their possibility a healthy atmosphere of accountability."

[1] "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . ." Also requiring notice is the Fifth Amendment's provision that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ."

[2] "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel in his defence."

incrimination guaranteed by the Fifth,[3] and the right to confrontation guaranteed by the Sixth.[4] The Court here holds, however, that these four Bill of Rights safeguards apply to protect a juvenile accused in a juvenile court on a charge under which he can be imprisoned for a term of years. This holding strikes a well-nigh fatal blow to much that is unique about the juvenile courts in the Nation. For this reason, there is much to be said for the position of my Brother STEWART that we should not pass on all these issues until they are more squarely presented. But since the majority of the Court chooses to decide all of these questions, I must either do the same or leave my views unexpressed on the important issues determined. In these circumstances, I feel impelled to express my views.

The juvenile court planners envisaged a system that would practically immunize juveniles from "punishment" for "crimes" in an effort to save them from youthful indiscretions and stigmas due to criminal charges or convictions. I agree with the Court, however, that this exalted ideal has failed of achievement since the beginning of the system. Indeed, the state laws from the first one on contained provisions, written in emphatic terms, for arresting and charging juveniles with violations of state criminal laws, as well as for taking juveniles by force of law away from their parents and turning them over to different individuals or groups or for confinement within some state school or institution for a number of years. The latter occurred in this case. Young Gault was arrested and detained on a charge of violating an Arizona penal law by using vile and offensive language to a lady on the telephone. If an adult, he

[3] "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

[4] "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

could only have been fined or imprisoned for two months for his conduct. As a juvenile, however, he was put through a more or less secret, informal hearing by the court, after which he was ordered, or, more realistically, "sentenced," to confinement in Arizona's Industrial School until he reaches 21 years of age. Thus, in a juvenile system designed to lighten or avoid punishment for criminality, he was ordered by the State to six years' confinement in what is in all but name a penitentiary or jail.

Where a person, infant or adult, can be seized by the State, charged, and convicted for violating a state criminal law, and then ordered by the State to be confined for six years, I think the Constitution requires that he be tried in accordance with the guarantees of all the provisions of the Bill of Rights made applicable to the States by the Fourteenth Amendment. Undoubtedly this would be true of an adult defendant, and it would be a plain denial of equal protection of the laws—an invidious discrimination—to hold that others subject to heavier punishments could, because they are children, be denied these same constitutional safeguards. I consequently agree with the Court that the Arizona law as applied here denied to the parents and their son the right of notice, right to counsel, right against self-incrimination, and right to confront the witnesses against young Gault. Appellants are entitled to these rights, not because "fairness, impartiality and orderliness—in short, the essentials of due process"—require them and not because they are "the procedural rules which have been fashioned from the generality of due process," but because they are specifically and unequivocally granted by provisions of the Fifth and Sixth Amendments which the Fourteenth Amendment makes applicable to the States.

A few words should be added because of the opinion of my Brother HARLAN who rests his concurrence and

dissent on the Due Process Clause alone. He reads that clause alone as allowing this Court "to determine what forms of procedural protection are necessary to guarantee the fundamental fairness of juvenile proceedings" "in a fashion consistent with the 'traditions and conscience of our people.'" Cf. *Rochin* v. *California*, 342 U. S. 165. He believes that the Due Process Clause gives this Court the power, upon weighing a "compelling public interest," to impose on the States only those specific constitutional rights which the Court deems "imperative" and "necessary" to comport with the Court's notions of "fundamental fairness."

I cannot subscribe to any such interpretation of the Due Process Clause. Nothing in its words or its history permits it, and "fair distillations of relevant judicial history" are no substitute for the words and history of the clause itself. The phrase "due process of law" has through the years evolved as the successor in purpose and meaning to the words "law of the land" in Magna Charta which more plainly intended to call for a trial according to the existing law of the land in effect at the time an alleged offense had been committed. That provision in Magna Charta was designed to prevent defendants from being tried according to criminal laws or proclamations specifically promulgated to fit particular cases or to attach new consequences to old conduct. Nothing done since Magna Charta can be pointed to as intimating that the Due Process Clause gives courts power to fashion laws in order to meet new conditions, to fit the "decencies" of changed conditions, or to keep their consciences from being shocked by legislation, state or federal.

And, of course, the existence of such awesome judicial power cannot be buttressed or created by relying on the word "procedural." Whether labeled as "procedural" or "substantive," the Bill of Rights safeguards, far from

being mere "tools with which" other unspecified "rights could be fully vindicated," are the very vitals of a sound constitutional legal system designed to protect and safeguard the most cherished liberties of a free people. These safeguards were written into our Constitution not by judges but by Constitution makers. Freedom in this Nation will be far less secure the very moment that it is decided that judges can determine which of these safeguards "should" or "should not be imposed" according to their notions of what constitutional provisions are consistent with the "traditions and conscience of our people." Judges with such power, even though they profess to "proceed with restraint," will be above the Constitution, with power to write it, not merely to interpret it, which I believe to be the only power constitutionally committed to judges.

There is one ominous sentence, if not more, in my Brother HARLAN'S opinion which bodes ill, in my judgment, both for legislative programs and constitutional commands. Speaking of procedural safeguards in the Bill of Rights, he says:

> "These factors in combination suggest that legislatures may properly expect only a cautious deference for their procedural judgments, but that, conversely, courts must exercise their special responsibility for procedural guarantees with care to permit ample scope for achieving the purposes of legislative programs. . . . [T]he court should necessarily proceed with restraint."

It is to be noted here that this case concerns Bill of Rights Amendments; that the "procedure" power my Brother HARLAN claims for the Court here relates solely to Bill of Rights safeguards; and that he is here claiming for the Court a supreme power to fashion new Bill of Rights safeguards according to the Court's notions of

what fits tradition and conscience. I do not believe that the Constitution vests any such power in judges, either in the Due Process Clause or anywhere else. Consequently, I do not vote to invalidate this Arizona law on the ground that it is "unfair" but solely on the ground that it violates the Fifth and Sixth Amendments made obligatory on the States by the Fourteenth Amendment. Cf. *Pointer* v. *Texas*, 380 U. S. 400, 412 (Goldberg, J., concurring). It is enough for me that the Arizona law as here applied collides head-on with the Fifth and Sixth Amendments in the four respects mentioned. The only relevance to me of the Due Process Clause is that it would, of course, violate due process or the "law of the land" to enforce a law that collides with the Bill of Rights.

MR. JUSTICE WHITE, concurring.

I join the Court's opinion except for Part V. I also agree that the privilege against compelled self-incrimination applies at the adjudicatory stage of juvenile court proceedings. I do not, however, find an adequate basis in the record for determining whether that privilege was violated in this case. The Fifth Amendment protects a person from being "compelled" in any criminal proceeding to be a witness against himself. Compulsion is essential to a violation. It may be that when a judge, armed with the authority he has or which people think he has, asks questions of a party or a witness in an adjudicatory hearing, that person, especially if a minor, would feel compelled to answer, absent a warning to the contrary or similar information from some other source. The difficulty is that the record made at the habeas corpus hearing, which is the only information we have concerning the proceedings in the juvenile court, does not directly inform us whether Gerald Gault or his parents were told of Gerald's right to remain silent; nor does it reveal whether the parties

were aware of the privilege from some other source, just as they were already aware that they had the right to have the help of counsel and to have witnesses on their behalf. The petition for habeas corpus did not raise the Fifth Amendment issue nor did any of the witnesses focus on it.

I have previously recorded my views with respect to what I have deemed unsound applications of the Fifth Amendment. See, for example, *Miranda* v. *Arizona*, 384 U. S. 436, 526, and *Malloy* v. *Hogan*, 378 U. S. 1, 33, dissenting opinions. These views, of course, have not prevailed. But I do hope that the Court will proceed with some care in extending the privilege, with all its vigor, to proceedings in juvenile court, particularly the nonadjudicatory stages of those proceedings.

In any event, I would not reach the Fifth Amendment issue here. I think the Court is clearly ill-advised to review this case on the basis of *Miranda* v. *Arizona*, since the adjudication of delinquency took place in 1964, long before the *Miranda* decision. See *Johnson* v. *New Jersey*, 384 U. S. 719. Under these circumstances, this case is a poor vehicle for resolving a difficult problem. Moreover, no prejudice to appellants is at stake in this regard. The judgment below must be reversed on other grounds and in the event further proceedings are to be had, Gerald Gault will have counsel available to advise him.

For somewhat similar reasons, I would not reach the questions of confrontation and cross-examination which are also dealt with in Part V of the opinion.

MR. JUSTICE HARLAN, concurring in part and dissenting in part.

Each of the 50 States has created a system of juvenile or family courts, in which distinctive rules are employed and special consequences imposed. The jurisdiction of

these courts commonly extends both to cases which the States have withdrawn from the ordinary processes of criminal justice, and to cases which involve acts that, if performed by an adult, would not be penalized as criminal. Such courts are denominated civil, not criminal, and are characteristically said not to administer criminal penalties. One consequence of these systems, at least as Arizona construes its own, is that certain of the rights guaranteed to criminal defendants by the Constitution are withheld from juveniles. This case brings before this Court for the first time the question of what limitations the Constitution places upon the operation of such tribunals.[1] For reasons which follow, I have concluded that the Court has gone too far in some respects, and fallen short in others, in assessing the procedural requirements demanded by the Fourteenth Amendment.

I.

I must first acknowledge that I am unable to determine with any certainty by what standards the Court decides that Arizona's juvenile courts do not satisfy the obligations of due process. The Court's premise, itself the product of reasoning which is not described, is that the "constitutional and theoretical basis" of state systems of juvenile and family courts is "debatable"; it buttresses these doubts by marshaling a body of opinion which suggests that the accomplishments of these courts have often fallen short of expectations.[2] The Court does not

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[1] *Kent* v. *United States*, 383 U. S. 541, decided at the 1965 Term, did not purport to rest on constitutional grounds.

[2] It is appropriate to observe that, whatever the relevance the Court may suppose that this criticism has to present issues, many of the critics have asserted that the deficiencies of juvenile courts have stemmed chiefly from the inadequacy of the personnel and resources available to those courts. See, *e. g.*, Paulsen, Kent v. United States: The Constitutional Context of Juvenile Cases, 1966

indicate at what points or for what purposes such views, held either by it or by other observers, might be pertinent to the present issues. Its failure to provide any discernible standard for the measurement of due process in relation to juvenile proceedings unfortunately might be understood to mean that the Court is concerned principally with the wisdom of having such courts at all.

If this is the source of the Court's dissatisfaction, I cannot share it. I should have supposed that the constitutionality of juvenile courts was beyond proper question under the standards now employed to assess the substantive validity of state legislation under the Due Process Clause of the Fourteenth Amendment. It can scarcely be doubted that it is within the State's competence to adopt measures reasonably calculated to meet more effectively the persistent problems of juvenile delinquency; as the opinion for the Court makes abundantly plain, these are among the most vexing and ominous of the concerns which now face communities throughout the country.

The proper issue here is, however, not whether the State may constitutionally treat juvenile offenders through a system of specialized courts, but whether the proceedings in Arizona's juvenile courts include procedural guarantees which satisfy the requirements of the Fourteenth Amendment. Among the first premises of our constitutional system is the obligation to conduct any proceeding in which an individual may be deprived of liberty or property in a fashion consistent with the "traditions and conscience of our people." *Snyder* v. *Massachusetts*, 291 U. S. 97, 105. The importance of these procedural guarantees is doubly intensified here. First, many of the problems with which Arizona is concerned

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Sup. Ct. Rev. 167, 191–192; Handler, The Juvenile Court and the Adversary System: Problems of Function and Form, 1965 Wis. L. Rev. 7, 46.

are among those traditionally confined to the processes of criminal justice; their disposition necessarily affects in the most direct and substantial manner the liberty of individual citizens. Quite obviously, systems of specialized penal justice might permit erosion, or even evasion, of the limitations placed by the Constitution upon state criminal proceedings. Second, we must recognize that the character and consequences of many juvenile court proceedings have in fact closely resembled those of ordinary criminal trials. Nothing before us suggests that juvenile courts were intended as a device to escape constitutional constraints, but I entirely agree with the Court that we are nonetheless obliged to examine with circumspection the procedural guarantees the State has provided.

The central issue here, and the principal one upon which I am divided from the Court, is the method by which the procedural requirements of due process should be measured. It must at the outset be emphasized that the protections necessary here cannot be determined by resort to any classification of juvenile proceedings either as criminal or as civil, whether made by the State or by this Court. Both formulae are simply too imprecise to permit reasoned analysis of these difficult constitutional issues. The Court should instead measure the requirements of due process by reference both to the problems which confront the State and to the actual character of the procedural system which the State has created. The Court has for such purposes chiefly examined three connected sources: first, the "settled usages and modes of proceeding," *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 277; second, the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," *Hebert* v. *Louisiana*, 272 U. S. 312, 316; and third, the character and requirements of the circumstances presented in each situation. *FCC* v. *WJR*, 337 U. S. 265, 277; *Yakus* v.

United States, 321 U. S. 414. See, further, my dissenting opinion in *Poe* v. *Ullman*, 367 U. S. 497, 522, and compare my opinion concurring in the result in *Pointer* v. *Texas*, 380 U. S. 400, 408. Each of these factors is relevant to the issues here, but it is the last which demands particular examination.

The Court has repeatedly emphasized that determination of the constitutionally required procedural safeguards in any situation requires recognition both of the "interests affected" and of the "circumstances involved." *FCC* v. *WJR*, *supra*, at 277. In particular, a "compelling public interest" must, under our cases, be taken fully into account in assessing the validity under the due process clauses of state or federal legislation and its application. See, *e. g.*, *Yakus* v. *United States*, *supra*, at 442; *Bowles* v. *Willingham*, 321 U. S. 503, 520; *Miller* v. *Schoene*, 276 U. S. 272, 279. Such interests would never warrant arbitrariness or the diminution of any specifically assured constitutional right, *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 426, but they are an essential element of the context through which the legislation and proceedings under it must be read and evaluated.

No more evidence of the importance of the public interests at stake here is required than that furnished by the opinion of the Court; it indicates that "some 601,000 children under 18, or 2% of all children between 10 and 17, came before juvenile courts" in 1965, and that "about one-fifth of all arrests for serious crimes" in 1965 were of juveniles. The Court adds that the rate of juvenile crime is steadily rising. All this, as the Court suggests, indicates the importance of these due process issues, but it mirrors no less vividly that state authorities are confronted by formidable and immediate problems involving the most fundamental social values. The state legislatures have determined that the most hopeful solution for

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these problems is to be found in specialized courts, organized under their own rules and imposing distinctive consequences. The terms and limitations of these systems are not identical, nor are the procedural arrangements which they include, but the States are uniform in their insistence that the ordinary processes of criminal justice are inappropriate, and that relatively informal proceedings, dedicated to premises and purposes only imperfectly reflected in the criminal law, are instead necessary.

It is well settled that the Court must give the widest deference to legislative judgments that concern the character and urgency of the problems with which the State is confronted. Legislatures are, as this Court has often acknowledged, the "main guardian" of the public interest, and, within their constitutional competence, their understanding of that interest must be accepted as "well-nigh" conclusive. *Berman* v. *Parker,* 348 U. S. 26, 32. This principle does not, however, reach all the questions essential to the resolution of this case. The legislative judgments at issue here embrace assessments of the necessity and wisdom of procedural guarantees; these are questions which the Constitution has entrusted at least in part to courts, and upon which courts have been understood to possess particular competence. The fundamental issue here is, therefore, in what measure and fashion the Court must defer to legislative determinations which encompass constitutional issues of procedural protection.

It suffices for present purposes to summarize the factors which I believe to be pertinent. It must first be emphasized that the deference given to legislators upon substantive issues must realistically extend in part to ancillary procedural questions. Procedure at once reflects and creates substantive rights, and every effort of courts since the beginnings of the common law to separate the two has proved essentially futile. The distinction between them is particularly inadequate here, where the

legislature's substantive preferences directly and unavoidably require judgments about procedural issues. The procedural framework is here a principal element of the substantive legislative system; meaningful deference to the latter must include a portion of deference to the former. The substantive-procedural dichotomy is, nonetheless, an indispensable tool of analysis, for it stems from fundamental limitations upon judicial authority under the Constitution. Its premise is ultimately that courts may not substitute for the judgments of legislators their own understanding of the public welfare, but must instead concern themselves with the validity under the Constitution of the methods which the legislature has selected. See, *e. g., McLean* v. *Arkansas,* 211 U. S. 539, 547; *Olsen* v. *Nebraska,* 313 U. S. 236, 246–247. The Constitution has in this manner created for courts and legislators areas of primary responsibility which are essentially congruent to their areas of special competence. Courts are thus obliged both by constitutional command and by their distinctive functions to bear particular responsibility for the measurement of procedural due process. These factors in combination suggest that legislatures may properly expect only a cautious deference for their procedural judgments, but that, conversely, courts must exercise their special responsibility for procedural guarantees with care to permit ample scope for achieving the purposes of legislative programs. Plainly, courts can exercise such care only if they have in each case first studied thoroughly the objectives and implementation of the program at stake; if, upon completion of those studies, the effect of extensive procedural restrictions upon valid legislative purposes cannot be assessed with reasonable certainty, the court should necessarily proceed with restraint.

The foregoing considerations, which I believe to be fair distillations of relevant judicial history, suggest

three criteria by which the procedural requirements of due process should be measured here: first, no more restrictions should be imposed than are imperative to assure the proceedings' fundamental fairness; second, the restrictions which are imposed should be those which preserve, so far as possible, the essential elements of the State's purpose; and finally, restrictions should be chosen which will later permit the orderly selection of any additional protections which may ultimately prove necessary. In this way, the Court may guarantee the fundamental fairness of the proceeding, and yet permit the State to continue development of an effective response to the problems of juvenile crime.

II.

Measured by these criteria, only three procedural requirements should, in my opinion, now be deemed required of state juvenile courts by the Due Process Clause of the Fourteenth Amendment: first, timely notice must be provided to parents and children of the nature and terms of any juvenile court proceeding in which a determination affecting their rights or interests may be made; second, unequivocal and timely notice must be given that counsel may appear in any such proceeding in behalf of the child and its parents, and that in cases in which the child may be confined in an institution, counsel may, in circumstances of indigency, be appointed for them; and third, the court must maintain a written record, or its equivalent, adequate to permit effective review on appeal or in collateral proceedings. These requirements would guarantee to juveniles the tools with which their rights could be fully vindicated, and yet permit the States to pursue without unnecessary hindrance the purposes which they believe imperative in this field. Further, their imposition now would later

permit more intelligent assessment of the necessity under the Fourteenth Amendment of additional requirements, by creating suitable records from which the character and deficiencies of juvenile proceedings could be accurately judged. I turn to consider each of these three requirements.

The Court has consistently made plain that adequate and timely notice is the fulcrum of due process, whatever the purposes of the proceeding. See, *e. g., Roller* v. *Holly,* 176 U. S. 398, 409; *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413, 424. Notice is ordinarily the prerequisite to effective assertion of any constitutional or other rights; without it, vindication of those rights must be essentially fortuitous. So fundamental a protection can neither be spared here nor left to the "favor or grace" of state authorities. *Central of Georgia Ry.* v. *Wright,* 207 U. S. 127, 138; *Coe* v. *Armour Fertilizer Works, supra,* at 425.

Provision of counsel and of a record, like adequate notice, would permit the juvenile to assert very much more effectively his rights and defenses, both in the juvenile proceedings and upon direct or collateral review. The Court has frequently emphasized their importance in proceedings in which an individual may be deprived of his liberty, see *Gideon* v. *Wainwright,* 372 U. S. 335, and *Griffin* v. *Illinois,* 351 U. S. 12; this reasoning must include with special force those who are commonly inexperienced and immature. See *Powell* v. *Alabama,* 287 U. S. 45. The facts of this case illustrate poignantly the difficulties of review without either an adequate record or the participation of counsel in the proceeding's initial stages. At the same time, these requirements should not cause any substantial modification in the character of juvenile court proceedings: counsel, although now present in only a small percentage of juvenile cases, have apparently already appeared without

incident in virtually all juvenile courts; [3] and the maintenance of a record should not appreciably alter the conduct of these proceedings.

The question remains whether certain additional requirements, among them the privilege against self-incrimination, confrontation, and cross-examination, must now, as the Court holds, also be imposed. I share in part the views expressed in my Brother WHITE's concurring opinion, but believe that there are other, and more deep-seated, reasons to defer, at least for the present, the imposition of such requirements.

Initially, I must vouchsafe that I cannot determine with certainty the reasoning by which the Court concludes that these further requirements are now imperative. The Court begins from the premise, to which it gives force at several points, that juvenile courts need not satisfy "all of the requirements of a criminal trial." It therefore scarcely suffices to explain the selection of these particular procedural requirements for the Court to declare that juvenile court proceedings are essentially criminal, and thereupon to recall that these are requisites for a criminal trial. Nor does the Court's voucher of "authoritative opinion," which consists of four extraordinary juvenile cases, contribute materially to the solution of these issues. The Court has, even under its own premises, asked the wrong questions: the problem here is to determine what forms of procedural protection are necessary to guarantee the fundamental fairness of juvenile proceedings, and not which of the procedures now employed in criminal trials should be transplanted intact to proceedings in these specialized courts.

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[3] The statistical evidence here is incomplete, but see generally Skoler & Tenney, Attorney Representation in Juvenile Court, 4 J. Fam. Law 77. They indicate that some 91% of the juvenile court judges whom they polled favored representation by counsel in their courts. *Id.*, at 88.

In my view, the Court should approach this question in terms of the criteria, described above, which emerge from the history of due process adjudication. Measured by them, there are compelling reasons at least to defer imposition of these additional requirements. First, quite unlike notice, counsel, and a record, these requirements might radically alter the character of juvenile court proceedings. The evidence from which the Court reasons that they would not is inconclusive,[4] and other available evidence suggests that they very likely would.[5] At the least, it is plain that these additional requirements would contribute materially to the creation in these proceedings of the atmosphere of an ordinary criminal trial, and would, even if they do no more, thereby largely frustrate a central purpose of these specialized courts. Further, these are restrictions intended to conform to the demands of an intensely adversary system of criminal justice; the broad purposes which they represent might be served in juvenile courts with equal effectiveness by procedural devices more consistent with the premises of proceedings

[4] Indeed, my Brother BLACK candidly recognizes that such is apt to be the effect of today's decision, *ante*, p. 60. The Court itself is content merely to rely upon inapposite language from the recommendations of the Children's Bureau, plus the terms of a single statute.

[5] The most cogent evidence of course consists of the steady rejection of these requirements by state legislatures and courts. The wide disagreement and uncertainty upon this question are also reflected in Paulsen, Kent v. United States: The Constitutional Context of Juvenile Cases, 1966 Sup. Ct. Rev. 167, 186, 191. See also Paulsen, Fairness to the Juvenile Offender, 41 Minn. L. Rev. 547, 561–562; McLean, An Answer to the Challenge of *Kent*, 53 A. B. A. J. 456, 457; Alexander, Constitutional Rights in Juvenile Court, 46 A. B. A. J. 1206; Shears, Legal Problems Peculiar to Children's Courts, 48 A. B. A. J. 719; Siler, The Need for Defense Counsel in the Juvenile Court, 11 Crime & Delin. 45, 57–58. Compare Handler, The Juvenile Court and the Adversary System: Problems of Function and Form, 1965 Wis. L. Rev. 7, 32.

in those courts. As the Court apparently acknowledges, the hazards of self-accusation, for example, might be avoided in juvenile proceedings without the imposition of all the requirements and limitations which surround the privilege against self-incrimination. The guarantee of adequate notice, counsel, and a record would create conditions in which suitable alternative procedures could be devised; but, unfortunately, the Court's haste to impose restrictions taken intact from criminal procedure may well seriously hamper the development of such alternatives. Surely this illustrates that prudence and the principles of the Fourteenth Amendment alike require that the Court should now impose no more procedural restrictions than are imperative to assure fundamental fairness, and that the States should instead be permitted additional opportunities to develop without unnecessary hindrance their systems of juvenile courts.

I find confirmation for these views in two ancillary considerations. First, it is clear that an uncertain, but very substantial number of the cases brought to juvenile courts involve children who are not in any sense guilty of criminal misconduct. Many of these children have simply the misfortune to be in some manner distressed; others have engaged in conduct, such as truancy, which is plainly not criminal.[6] Efforts are now being made to develop effective, and entirely noncriminal, methods of treatment for these children.[7] In such cases, the state authorities

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[6] Estimates of the number of children in this situation brought before juvenile courts range from 26% to some 48%; variation seems chiefly a product both of the inadequacy of records and of the difficulty of categorizing precisely the conduct with which juveniles are charged. See generally Sheridan, Juveniles Who Commit Noncriminal Acts: Why Treat in a Correctional System? 31 Fed. Probation 26, 27. By any standard, the number of juveniles involved is "considerable." *Ibid.*

[7] *Id.*, at 28–30.

are in the most literal sense acting *in loco parentis;* they are, by any standard, concerned with the child's protection, and not with his punishment. I do not question that the methods employed in such cases must be consistent with the constitutional obligation to act in accordance with due process, but certainly the Fourteenth Amendment does not demand that they be constricted by the procedural guarantees devised for ordinary criminal prosecutions. Cf. *Minnesota ex rel. Pearson* v. *Probate Court,* 309 U. S. 270. It must be remembered that the various classifications of juvenile court proceedings are, as the vagaries of the available statistics illustrate, often arbitrary or ambiguous; it would therefore be imprudent, at the least, to build upon these classifications rigid systems of procedural requirements which would be applicable, or not, in accordance with the descriptive label given to the particular proceeding. It is better, it seems to me, to begin by now requiring the essential elements of fundamental fairness in juvenile courts, whatever the label given by the State to the proceeding; in this way the Court could avoid imposing unnecessarily rigid restrictions, and yet escape dependence upon classifications which may often prove to be illusory. Further, the provision of notice, counsel, and a record would permit orderly efforts to determine later whether more satisfactory classifications can be devised, and if they can, whether additional procedural requirements are necessary for them under the Fourteenth Amendment.

Second, it should not be forgotten that juvenile crime and juvenile courts are both now under earnest study throughout the country. I very much fear that this Court, by imposing these rigid procedural requirements, may inadvertently have served to discourage these efforts to find more satisfactory solutions for the problems of juvenile crime, and may thus now hamper enlightened development of the systems of juvenile courts. It is

appropriate to recall that the Fourteenth Amendment does not compel the law to remain passive in the midst of change; to demand otherwise denies "every quality of the law but its age." *Hurtado* v. *California*, 110 U. S. 516, 529.

III.

Finally, I turn to assess the validity of this juvenile court proceeding under the criteria discussed in this opinion. Measured by them, the judgment below must, in my opinion, fall. Gerald Gault and his parents were not provided adequate notice of the terms and purposes of the proceedings in which he was adjudged delinquent; they were not advised of their rights to be represented by counsel; and no record in any form was maintained of the proceedings. It follows, for the reasons given in this opinion, that Gerald Gault was deprived of his liberty without due process of law, and I therefore concur in the judgment of the Court.

MR. JUSTICE STEWART, dissenting.

The Court today uses an obscure Arizona case as a vehicle to impose upon thousands of juvenile courts throughout the Nation restrictions that the Constitution made applicable to adversary criminal trials.[1] I believe the Court's decision is wholly unsound as a matter of constitutional law, and sadly unwise as a matter of judicial policy.

Juvenile proceedings are not criminal trials. They are not civil trials. They are simply not adversary proceedings. Whether treating with a delinquent child, a neg-

[1] I find it strange that a Court so intent upon fastening an absolute right to counsel upon nonadversary juvenile proceedings has not been willing even to consider whether the Constitution requires a lawyer's help in a criminal prosecution upon a misdemeanor charge. See *Winters* v. *Beck*, 385 U. S. 907; *DeJoseph* v. *Connecticut*, 385 U. S. 982.

lected child, a defective child, or a dependent child, a juvenile proceeding's whole purpose and mission is the very opposite of the mission and purpose of a prosecution in a criminal court. The object of the one is correction of a condition. The object of the other is conviction and punishment for a criminal act.

In the last 70 years many dedicated men and women have devoted their professional lives to the enlightened task of bringing us out of the dark world of Charles Dickens in meeting our responsibilities to the child in our society. The result has been the creation in this century of a system of juvenile and family courts in each of the 50 States. There can be no denying that in many areas the performance of these agencies has fallen disappointingly short of the hopes and dreams of the courageous pioneers who first conceived them. For a variety of reasons, the reality has sometimes not even approached the ideal, and much remains to be accomplished in the administration of public juvenile and family agencies—in personnel, in planning, in financing, perhaps in the formulation of wholly new approaches.

I possess neither the specialized experience nor the expert knowledge to predict with any certainty where may lie the brightest hope for progress in dealing with the serious problems of juvenile delinquency. But I am certain that the answer does not lie in the Court's opinion in this case, which serves to convert a juvenile proceeding into a criminal prosecution.

The inflexible restrictions that the Constitution so wisely made applicable to adversary criminal trials have no inevitable place in the proceedings of those public social agencies known as juvenile or family courts. And to impose the Court's long catalog of requirements upon juvenile proceedings in every area of the country is to invite a long step backwards into the nineteenth century. In that era there were no juvenile proceedings, and a

child was tried in a conventional criminal court with all the trappings of a conventional criminal trial. So it was that a 12-year-old boy named James Guild was tried in New Jersey for killing Catharine Beakes. A jury found him guilty of murder, and he was sentenced to death by hanging. The sentence was executed. It was all very constitutional.[2]

A State in all its dealings must, of course, accord every person due process of law. And due process may require that some of the same restrictions which the Constitution has placed upon criminal trials must be imposed upon juvenile proceedings. For example, I suppose that all would agree that a brutally coerced confession could not constitutionally be considered in a juvenile court hearing. But it surely does not follow that the testimonial privilege against self-incrimination is applicable in all juvenile proceedings.[3] Similarly, due process clearly

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[2] *State* v. *Guild*, 5 Halst. 163, 18 Am. Dec. 404 (N. J. Sup. Ct.). "Thus, also, in very modern times, a boy of ten years old was convicted on his own confession of murdering his bed-fellow, there appearing in his whole behavior plain tokens of a mischievous discretion; and as the sparing this boy merely on account of his tender years might be of dangerous consequence to the public, by propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the judges that he was a proper subject of capital punishment." 4 Blackstone, Commentaries 23 (Wendell ed. 1847).

[3] Until June 13, 1966, it was clear that the Fourteenth Amendment's ban upon the use of a coerced confession is constitutionally quite a different thing from the Fifth Amendment's testimonial privilege against self-incrimination. See, for example, the Court's unanimous opinion in *Brown* v. *Mississippi*, 297 U. S. 278, at 285–286, written by Chief Justice Hughes and joined by such distinguished members of this Court as Mr. Justice Brandeis, Mr. Justice Stone, and Mr. Justice Cardozo. See also *Tehan* v. *Shott*, 382 U. S. 406, decided January 19, 1966, where the Court emphasized the "contrast" between "the wrongful use of a coerced confession" and "the Fifth Amendment's privilege against self-incrimination." 382 U. S., at 416. The complete confusion of these separate con-

requires timely notice of the purpose and scope of any proceedings affecting the relationship of parent and child. *Armstrong* v. *Manzo*, 380 U. S. 545. But it certainly does not follow that notice of a juvenile hearing must be framed with all the technical niceties of a criminal indictment. See *Russell* v. *United States*, 369 U. S. 749.

In any event, there is no reason to deal with issues such as these in the present case. The Supreme Court of Arizona found that the parents of Gerald Gault "knew of their right to counsel, to subpoena and cross examine witnesses, of the right to confront the witnesses against Gerald and the possible consequences of a finding of delinquency." 99 Ariz. 181, 185, 407 P. 2d 760, 763. It further found that "Mrs. Gault knew the exact nature of the charge against Gerald from the day he was taken to the detention home." 99 Ariz., at 193, 407 P. 2d, at 768. And, as MR. JUSTICE WHITE correctly points out, pp. 64–65, *ante*, no issue of compulsory self-incrimination is presented by this case.

I would dismiss the appeal.

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stitutional doctrines in Part V of the Court's opinion today stems, no doubt, from *Miranda* v. *Arizona*, 384 U. S. 436, a decision which I continue to believe was constitutionally erroneous.

DOMBROWSKI ET AL. *v.* EASTLAND ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 118. Argued February 20, 1967.—Decided May 15, 1967.

Petitioners claim that respondents, Chairman of the Internal Security Subcommittee of the U. S. Senate Judiciary Committee and the Subcommittee's chief counsel, tortiously entered into and participated in a conspiracy with Louisiana officials to seize petitioners' property and records in violation of the Fourth Amendment. Louisiana courts held the arrests and searches illegal. Here, the court below, while recognizing difficulty in concluding that there were no disputed issues of fact respecting petitioners' claim, upheld summary dismissal of the action on the ground of respondents' legislative immunity. *Held:* Since there is no evidence of the respondent Chairman's "involvement in any activity that could result in liability," the complaint as to him was properly dismissed. The doctrine of legislative immunity protects "legislators engaged 'in the sphere of legitimate legislative activity,' . . . not only from the consequences of litigation's results but also from the burden of defending themselves." However, the doctrine of legislative immunity is less absolute when applied to officers or employees of legislative bodies. There is a sufficient factual dispute with respect to the alleged participation in the conspiracy of the subcommittee's chief counsel to require that a trial be had. The legal consequences of such participation, if it occurred, cannot be determined prior to the factual refinement of trial. The judgment below is therefore reversed as to the subcommittee's chief counsel.

123 U. S. App. D. C. 190, 358 F. 2d 821, affirmed in part and reversed and remanded in part.

Arthur Kinoy argued the cause for petitioners. With him on the brief was *William M. Kunstler.*

Roger Robb argued the cause for respondents. With him on the brief were *Solicitor General Marshall, Assistant Attorney General Sanders* and *David L. Rose.*

PER CURIAM.

The Court of Appeals for the District of Columbia Circuit sustained the order granting summary judgment

to the respondents who are, respectively, the Chairman and counsel of the Internal Security Subcommittee of the Judiciary Committee of the United States Senate. Petitioners' claim is essentially that respondents tortiously entered into and participated in a conspiracy and concert of action with Louisiana officials to seize property and records of petitioners by unlawful means in violation of petitioners' Fourth Amendment rights. The circumstances of the searches and arrests involved are set forth in *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965), and in Judge Wisdom's dissenting opinion in the District Court in that case, 227 F. Supp. 556, 573 (D. C. E. D. La. 1964). Louisiana courts held the arrests and searches illegal because the warrants secured by the police had not been supported by a showing of probable cause. In a civil suit by these same petitioners against the Louisiana officials allegedly involved in the conspiracy, the Court of Appeals for the Fifth Circuit, reversing a summary judgment in favor of third-party defendants, held that plaintiffs had raised a genuine issue of material fact whether the Chairman "and the other members of the [State] Committee were 'acting in the sphere of *legitimate* legislative activity,' which would entitle them to immunity." *Pfister* v. *Arceneaux,* 376 F. 2d 821.

In the present case, the court below recognized "considerable difficulty" in reaching the conclusion that, on the basis of the affidavits of the parties, there were no disputed issues of fact with respect to petitioners' claim. It nevertheless upheld summary dismissal of the action on the ground that "the record before the District Court contained unchallenged facts of a nature and scope sufficient to give [respondents] an immunity against answerability in damages . . . ." In support of this conclusion the court addressed itself to only that part of petitioners' claims which related to the take-over of the records by

respondents *after* the "raids." As to this, it held that the subject matter of the seized records was within the jurisdiction of the Senate Subcommittee and that the issuance of subpoenas to the Louisiana committee to obtain the records held by it was validated by subsequent Subcommittee ratification. On this basis, the court held that the acts for which petitioners seek relief were privileged, citing *Tenney* v. *Brandhove*, 341 U. S. 367 (1951).

The court did not specifically comment upon petitioners' contention that the record shows a material dispute of fact as to their claim that respondent Sourwine actively collaborated with counsel to the Louisiana committee in making the plans for the allegedly illegal "raids" pursuant to the claimed authority of the Louisiana committee and on its behalf, in which petitioners claim that their property and records were seized in violation of their Fourth Amendment rights. In the absence of the factual refinement which can occur only as a result of trial, we need not and, indeed, could not express judgment as to the legal consequences of such collaboration, if it occurred.

There is controverted evidence in the record, such as the date appearing on certain documents which respondents' evidence disputes as a typographical error, which affords more than merely colorable substance to petitioners' assertions as to respondent Sourwine. We make no comment as to whether this evidence standing alone would be sufficient to support a verdict in petitioners' favor against respondent Sourwine, or would require a verdict in his favor. But we believe that, as against an employee of the committee, this showing is sufficient to entitle petitioners to go to trial. In respect of respondent Eastland, we agree with the lower courts that petitioners' complaint must be dismissed. The record does not contain evidence of his involvement in any activity that could result in liability. It is the purpose and office of

the doctrine of legislative immunity, having its roots as it does in the Speech or Debate Clause of the Constitution, *Kilbourn* v. *Thompson,* 103 U. S. 168, 204 (1881), that legislators engaged "in the sphere of legitimate legislative activity," *Tenney* v. *Brandhove, supra,* 341 U. S., at 376, should be protected not only from the consequences of litigation's results but also from the burden of defending themselves. This Court has held, however, that this doctrine is less absolute, although applicable, when applied to officers or employees of a legislative body, rather than to legislators themselves. As the Court said in *Tenney* v. *Brandhove, supra,* the doctrine, in respect of a legislator, "deserves greater respect than where an official acting on behalf of the legislature is sued . . . ."* (341 U. S., at 378.) Cf. *Wheeldin* v. *Wheeler,* 373 U. S. 647 (1963). In light of this principle, we are compelled to hold that there is a sufficient factual dispute with respect to respondent Sourwine to require reversal of the judgment below as to him.

Accordingly, we affirm the order of the Court of Appeals as to respondent Eastland and reverse and remand to the District Court as to respondent Sourwine for further proceedings in accordance with this opinion.

MR. JUSTICE BLACK took no part in the consideration or decision of this case.

*As the Court pointed out in *Tenney, supra* (per Frankfurter, J.), in *Kilbourn* v. *Thompson, supra,* this Court "allowed a judgment against the Sergeant-at-Arms, but found that one could not be entered against the defendant members of the House." 341 U. S., at 378.

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IACURCI *v.* LUMMUS CO.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 6, Misc. Decided May 15, 1967.

In this wrongful death diversity action the District Court Judge submitted the question of negligence to the jury by a special interrogatory which asked that, if it found negligent design of the "skip hoist," it indicate which of five specific design aspects it had found unsafe. The jury returned a special verdict for petitioner but answered only one of the five subsections. Respondent's motion for judgment notwithstanding the verdict was denied and respondent appealed. The Court of Appeals concluded that respondent's negligence was not established as to the four design aspects that were unanswered, and, holding that the evidence did not support a finding of negligence on the fifth aspect, reversed with instructions to enter judgment for respondent. Petitioner's request for rehearing was denied. Since this Court does not share the Court of Appeals' confidence as to the meaning of the jury's failure to answer four subdivisions of the interrogatory, *held*, the Court of Appeals erred in directing judgment for respondent and the case should have been remanded to the Trial Judge who was in the best position to pass upon the question of a new trial.

Certiorari granted; 340 F. 2d 868, vacated in part and remanded.

Arnold B. Elkind for petitioner.

Raymond L. Falls, Jr., for respondent.

PER CURIAM.

Petitioner, whose husband was killed while testing the operation of a "skip hoist," brought this diversity action claiming that respondent had negligently designed the hoist. The Trial Judge submitted this question to the jury in the form of a special interrogatory which asked that the jury, if it found negligent design, "please indicate" which of five specified design aspects of the hoist

had been found unsafe. The jury was to answer "Yes" or "No" with respect to each of the five enumerated factors. The jury returned a special verdict for petitioner, answering one of the five subsections of the interrogatory in petitioner's favor and leaving the other four unanswered. The Trial Judge denied respondent's motion for judgment notwithstanding the jury's verdict, and respondent appealed.

The Court of Appeals in its principal opinion* concluded that "we must take it that they [the jury] found that Lummus' negligence was not established" as to the four aspects of design covered by the unanswered subsections of the interrogatory. The court then held that the evidence did not support the jury's finding of negligence as to the fifth aspect of design and reversed the trial court's judgment with instructions to enter judgment for respondent. Petitioner sought rehearing in the Court of Appeals, noting her timely objection to the trial court's use of the special interrogatory and arguing that the Court of Appeals had improperly restricted its review of the evidence to the one aspect of design. Rehearing was denied, one judge again dissenting, and this petition for a writ of certiorari followed.

We do not share the Court of Appeals' confidence as to the meaning, in light of the trial court's instructions, of the jury's failure to answer four subdivisions of the interrogatory. Perhaps the jury intended to resolve these questions in respondent's favor; but the jury might have been unable to agree on these issues, or it simply might not have passed upon them because it concluded that

*In addition, one member of the panel concurred and the other dissented. The concurring opinion, though based upon a completely different aspect of this complex case, appears to adopt the interpretation of the interrogatory answers which we find unwarranted.

respondent had negligently designed the hoist in another respect. In either of the latter two situations, petitioner would clearly deserve a new trial, at least as to these unresolved issues of negligence. See *Union Pac. R. Co.* v. *Bridal Veil Lumber Co.*, 219 F. 2d 825; 5 Moore, Federal Practice ¶ 49.03[4], at 2208 (1964 ed.). Under these circumstances, we think the Court of Appeals erred in directing entry of judgment for respondent; the case should have been remanded to the Trial Judge, who was in the best position to pass upon the question of a new trial in light of the evidence, his charge to the jury, and the jury's verdict and interrogatory answers. Fed. Rule Civ. Proc. 50 (d). See *Neely* v. *Eby Construction Co.*, 386 U. S. 317; *Weade* v. *Dichmann, Wright & Pugh, Inc.*, 337 U. S. 801. Accordingly, the motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted, the judgment of the Court of Appeals is vacated insofar as it directed entry of judgment for respondent, and the case is remanded with instructions to remand to the District Court to determine whether petitioner is entitled to a new trial.

It is so ordered.

MR. JUSTICE BLACK would reverse the judgment of the Court of Appeals and reinstate the judgment of the District Court in favor of petitioner.

MR. JUSTICE HARLAN, dissenting.

In *Neely* v. *Eby Construction Co.*, 386 U. S. 317, we held that a court of appeals might, despite denial by the trial judge of motions for a new trial and for judgment notwithstanding the verdict, appropriately instruct the district court to enter judgment against the jury-verdict winner. We also recognized in *Neely*, however, that there might be situations in which the necessity for a new trial would be better determined by the trial

court, and that in such situations the court of appeals should return the case to the district court for such an assessment.

In joining *Neely*, I did not understand the opinion to require this Court to interpose in each case its own judgment of the relative competence of the court of appeals and of the district court to pass on the new trial motion. Rather, I understood *Neely* to place upon the court of appeals the responsibility for determining "in its informed discretion," *supra*, at 329, which, if any, of the issues urged in support of a new trial "should be reserved for the trial court." *Ibid.* I think that sound judicial administration demands that this Court should overturn a considered judgment of a court of appeals on such issues only in situations of manifest abuse of discretion.

The Court in this instance states that it does "not share the Court of Appeals' confidence as to the meaning, in light of the trial court's instructions, of the jury's failure to answer" subquestions included in the interrogatories. The ambiguities upon which the Court now relies were earnestly urged by petitioner in her petition for rehearing to the Court of Appeals. Petition for Rehearing 5–6, 7–8. They were, as the Court in *Neely* intended, before the Court of Appeals for its judgment whether the case should be returned to the District Court for determination of the necessity for a new trial. Had I been sitting on the Court of Appeals I might not have agreed with the view taken of this case by the majority there, but I cannot agree that their conclusion was a manifest abuse of their "informed discretion." I hope that this decision does not indicate that the Court is about to embark on a course comparable to that it set for itself in FELA cases.

I would affirm the judgment of the Court of Appeals.

AERO MAYFLOWER TRANSIT CO., INC. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA.

No. 1136. Decided May 15, 1967.

Affirmed.

Henry P. Sailer and *James L. Beattey* for appellant.

Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Robert W. Ginnane and *Fritz R. Kahn* for the United States et al., and *Alan F. Wohlstetter* for Alaska Orient Van Service et al., appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

RUBIO *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 710, Misc. Decided May 15, 1967.

Certiorari granted; judgment reversed.

Petitioner *pro se.*

Solicitor General Marshall for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is reversed. *Coppedge* v. *United States,* 369 U. S. 438.

GERBERDING *v.* TAHASH, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

No. 1059, Misc. Decided May 15, 1967.

Certiorari granted; 275 Minn. 195, 146 N. W. 2d 541, reversed.

Petitioner *pro se.*

Douglas M. Head, Attorney General of Minnesota, *William J. Hempel,* Deputy Attorney General, and *Gerard W. Snell,* Acting Solicitor General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is reversed. *Jackson* v. *Denno,* 378 U. S. 368.

SKOLNICK *v.* KERNER, GOVERNOR OF ILLINOIS, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 1401, Misc. Decided May 15, 1967.

260 F. Supp. 318, appeal dismissed.

Appellant *pro se.*

William G. Clark, Attorney General of Illinois, and *Richard A. Michael,* Assistant Attorney General, for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

BANKS *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT.

No. 889, Misc. Decided May 15, 1967.

Certiorari granted; vacated and remanded.

Petitioner *pro se.*

Thomas C. Lynch, Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Charles W. Rumph,* Deputy Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the District Court of Appeal of California, First Appellate District, for further consideration in light of *Chapman* v. *California,* 386 U. S. 18.

AMERICAN TRUCKING ASSOCIATIONS, INC. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

No. 1046. Decided May 15, 1967.

260 F. Supp. 386, affirmed.

Peter T. Beardsley and *Harry J. Jordan* for appellant.

Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Robert W. Ginnane and *Leonard S. Goodman* for the United States et al., *Gerald E. Dwyer* and *Kenneth H. Lundmark* for New York Central Transport Co., and *Martin L. Cassell, Theodore E. Desch* and *Walter J. Myskowski* for Rock Island Motor Transit Co., appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

HOLDING, DBA GRAND NEWS *v.* BLANKENSHIP ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

No. 1088. Decided May 15, 1967.

259 F. Supp. 694, reversed in part and appeal dismissed and certiorari denied in part.

Samuel W. Block, Thomas P. Sullivan and *Paul C. Duncan* for appellant.

PER CURIAM.

Probable jurisdiction noted as to Question 1. The judgment of the District Court for the Western District of Oklahoma entered November 4, 1966, is reversed insofar as it adjudged provisions of §§ 1040.1 to 1040.10 of Title 21 of the Oklahoma Statutes to be constitutional. *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58. Treating the nonappealable issue presented by Question 2 as if contained in a petition for a writ of certiorari, the petition is denied. See *Mishkin* v. *New York,* 383 U. S. 502, 512.

MR. JUSTICE HARLAN concurs in the denial of certiorari as to Question 2, but would affirm the judgment of the District Court as to Question 1.

MR. JUSTICE WHITE would note probable jurisdiction and set the case for oral argument.

BLANKENSHIP ET AL. *v.* HOLDING, DBA GRAND NEWS.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

No. 1089. Decided May 15, 1967.

259 F. Supp. 694, affirmed.

Charles Nesbitt, Attorney General of Oklahoma, and *Jeff Hartmann*, Assistant Attorney General, for appellants.

Samuel W. Block, *Thomas P. Sullivan* and *Paul C. Duncan* for appellee.

PER CURIAM.

Probable jurisdiction noted. The judgment of the District Court for the Western District of Oklahoma entered November 4, 1966, is affirmed insofar as it adjudged provisions of §§ 1040.1 to 1040.10 of Title 21 of the Oklahoma Statutes to be unconstitutional.

WIRTZ, SECRETARY OF LABOR *v.* LOCAL UNIONS NOS. 9, 9–A, & 9–B, INTERNATIONAL UNION OF OPERATING ENGINEERS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 1116. Decided May 15, 1967.

Certiorari granted; 254 F. Supp. 980 and 366 F. 2d 911, vacated and remanded with directions to dismiss the complaint as moot.

Solicitor General Marshall, Assistant Attorney General Sanders, Nathan Lewin, Alan S. Rosenthal, Robert C. McDiarmid, Charles Donahue, Edward D. Friedman and *James R. Beaird* for petitioner.

J. Albert Woll for respondents.

PER CURIAM.

Upon the joint suggestion of the parties and an independent examination of the case, the petition for a writ of certiorari is granted, the judgments are vacated and the case is remanded with directions to dismiss the complaint as moot.

MOODY ET AL *v.* FLOWERS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA.

No. 624. Argued April 17–18, 1967.—Decided May 22, 1967.*

These cases involve attacks on state statutes on the ground that they cause malapportionment in the establishment of local units governed by elected bodies. In No. 624, appellants sued state officers and others seeking to enjoin enforcement of an Alabama statute which prescribes the apportionment and districting scheme for electing members of Houston County's governing board and allegedly causes overrepresentation of certain areas and underrepresentation of others. In No. 491, appellees sued the members of the Suffolk County Board of Supervisors seeking to enjoin enforcement of county charter provisions specifying that the County's governing board shall be composed of the supervisors of its 10 towns (which vary in population) each of whom shall have one vote. In both cases, three-judge district courts were convened under 28 U. S. C. § 2281, which requires a three-judge court where an injunction is sought to restrain the operation of a state statute. From the dismissal of the complaint in No. 624, and the judgment invalidating on equal-protection grounds the statute in No. 491, appeals were taken. *Held:*

1. The "statute" in each of these cases is one of limited application concerning only a particular county; hence a three-judge court was improperly convened under 28 U. S. C. § 2281 and each appeal should have been taken to the appropriate Court of Appeals, not to this Court. Pp. 101–104.

(a) The purpose of § 2281 is to prevent a single judge from paralyzing an entire regulatory scheme on a statewide basis by issuing a broad injunction order. P. 101.

(b) Section 2281 does not apply to local ordinances or resolutions, such as those involved in these cases or operate against state officers like those here who perform matters of only local concern. Pp. 101–102.

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*Together with No. 491, *Board of Supervisors of Suffolk County et al.* v. *Bianchi et al.*, on appeal from the United States District Court for the Eastern District of New York.

(c) A local device, like the one in No. 624, does not assume statewide significance for purposes of determining three-judge court jurisdiction because other local devices may work toward the same end. P. 102.

(d) The county charter, in No. 491, is similar to a local ordinance, and its character is not changed because it is enacted into state law. Though the alleged malapportionment reflected in that charter is also reflected in other statutory provisions having statewide application, the complaint challenged and the three-judge court considered only the charter and not statewide law. Pp. 102–104.

2. Since the time for perfecting appeals to the respective Courts of Appeals may have passed, the judgments are vacated and remanded for the entry of fresh decrees to facilitate timely appeals. P. 104.

No. 624, 256 F. Supp. 195; and No. 491, 256 F. Supp. 617, vacated and remanded.

Charles S. Rhyne argued the cause for appellants in No. 624. With him on the briefs were *Brice W. Rhyne* and *C. R. Lewis.*

Stanley S. Corwin argued the cause for appellants in No. 491. With him on the briefs were *Reginald C. Smith, Howard M. Finkelstein* and *Pierre G. Lundberg.*

Truman Hobbs argued the cause for appellees in No. 624. With him on the brief were *MacDonald Gallion,* Attorney General of Alabama, and *Gordon Madison,* Assistant Attorney General.

Frederic Block and *Richard C. Cahn* argued the cause and filed a brief for appellees in No. 491.

Francis X. Beytagh, Jr., argued the cause *pro hac vice* for the United States, as *amicus curiae,* urging reversal in No. 624 and affirmance in No. 491. With him on the brief were *Solicitor General Marshall, Assistant Attorney General Doar* and *Bruce J. Terris.*

Briefs of *amici curiae* were filed in both cases by *Louis J. Lefkowitz,* Attorney General, *pro se,* and *Daniel M.*

Cohen, Robert W. Imrie and *George D. Zuckerman,* Assistant Attorneys General, for the Attorney General of the State of New York, and by *Morris H. Schneider* and *Seymour S. Ross* for the County of Nassau. *Richard C. Cahn, Walter Maclyn Conlon* and *Robert G. Dixon, Jr.,* filed a brief for the Towns of Babylon et al., as *amici curiae,* urging affirmance in No. 491. Members of the Board of Supervisors of the County of Nassau filed a brief, as *amici curiae,* in No. 491.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The threshold question in these cases is whether this Court has jurisdiction under 28 U. S. C. § 1253 on direct appeals from the decisions of the respective District Courts purportedly convened pursuant to 28 U. S. C. § 2281. The answer to that question in turn depends upon whether the three-judge courts in these cases were properly convened.

In No. 624, appellants attack the validity of an Alabama statute (Ala. Laws 1957, Act No. 9, p. 30) prescribing the apportionment and districting scheme for electing members of the Houston County Board of Revenue and Control. Under the statute, the Board consists of five members, each elected by the qualified electors of the district of which he is a resident. The challenged statute prescribes the areas constituting the various districts. The action is brought against the appellees, including some state officials, seeking a declaration that the statute is invalid and an injunction prohibiting its enforcement, and requesting that the court order at-large elections until the State Legislature redistricts and reapportions the Board on a population basis. The theory is that the apportionment and districting scheme results in the overrepresentation of certain areas and the underrepresentation of others. The complaint also requested

the convening of a three-judge court. A three-judge court was convened and the complaint was dismissed. 256 F. Supp. 195. We noted probable jurisdiction, 385 U. S. 966.

In No. 491, appellees brought an action against appellants, members of the Suffolk County Board of Supervisors, seeking a declaration that so much of § 203 of the Suffolk County Charter (N. Y. Laws 1958, c. 278) as provides that each supervisor shall have one vote as a member of the Suffolk County Board of Supervisors violates the Fourteenth Amendment and an injunction prohibiting the appellants from acting as a Board of Supervisors unless and until a change in their voting strength is made, and requesting the convening of a three-judge court. The 10 towns of Suffolk County, New York, elect, by popular vote, a supervisor every two years. The supervisor is the town's representative on the Suffolk County Board of Supervisors. Suffolk County Charter § 201. And, each supervisor is entitled to one vote on the County Board of Supervisors. Suffolk County Charter § 203. Pursuant to Art. 9, §§ 1 and 2, of the New York Constitution, the State Legislature approved a charter for the county containing, *inter alia*, the above provisions. N. Y. Laws 1958, c. 278.

Appellees claim that granting each supervisor one vote regardless of the population of the town which elected him results in an overrepresentation of the towns with small populations and underrepresentation of towns with large populations.

A three-judge court was convened and it declared § 203 of the Suffolk County Charter invalid because in conflict with the Equal Protection Clause of the Fourteenth Amendment, and ordered the Board to submit to the county electorate a plan for reconstruction of the Board so as to insure voter equality. 256 F. Supp. 617. We noted probable jurisdiction. 385 U. S. 966.

This Court has jurisdiction of these direct appeals under 28 U. S. C. § 1253 only if the respective actions were "required . . . to be heard and determined by a district court of three judges." Section 2281 of 28 U. S. C. requires that a three-judge court be convened in any case in which a preliminary or permanent injunction is sought to restrain "the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute . . . ." The purpose of § 2281 is "to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme . . . by issuance of a broad injunctive order" (*Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 154) and to provide "procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy." *Phillips* v. *United States*, 312 U. S. 246, 251. In order for § 2281 to come into play the plaintiffs must seek to enjoin state statutes "by whatever method they may be adopted, to which a State gives her sanction . . . ." *American Federation of Labor* v. *Watson*, 327 U. S. 582, 592–593.

The Court has consistently construed the section as authorizing a three-judge court not merely because a state statute is involved but only when a state statute of general and statewide application is sought to be enjoined. See, *e. g.*, *Ex parte Collins*, 277 U. S. 565; *Ex parte Public National Bank*, 278 U. S. 101; *Rorick* v. *Board of Commissioners*, 307 U. S. 208; *Cleveland* v. *United States*, 323 U. S. 329, 332; *Griffin* v. *School Board*, 377 U. S. 218, 227–228. The term "statute" in § 2281 does not encompass local ordinances or resolutions. The officer sought to be enjoined must be a state officer; a three-judge court need not be convened where the action seeks to enjoin a local officer (*Ex parte Collins, supra; Rorick* v. *Board of Commissioners, supra*) unless he is

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functioning pursuant to a statewide policy and performing a state function. *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89. Nor does the section come into operation where an action is brought against state officers performing matters of purely local concern. *Rorick* v. *Board of Commissioners, supra.* And, the requirement that the action seek to enjoin a state officer cannot be circumvented "by joining, as nominal parties defendant, state officers whose action is not the effective means of the enforcement or execution of the challenged statute." *Wilentz* v. *Sovereign Camp*, 306 U. S. 573, 579–580.

In No. 624, the constitutional attack was directed to a state statute dealing with matters of local concern—the apportionment and districting for one county's governing board. The statute is not a statute of statewide application, but relates solely to the affairs of one county in the State. The fact that state officers were named as defendants cannot change the result.

It is said that there is enough similarity between this law and the laws governing other Alabama counties as to give this case a statewide interest. It is said that 29 counties having a city of consequence located within their borders have the same "crazy quilt" of malapportionment to insure rural voters' control. It is said that 32 other counties provide for election of county board members at large but with a local residence requirement which insures rural control. It is said that six rural counties elect their governing bodies on an at-large basis with no local residence requirement. We indicate no views on the merits. But we do suggest that even a variety of different devices, working perhaps to the same end, still leaves any one device local rather than statewide for purposes of the statutory three-judge court.

In No. 491, the constitutional attack is directed at provisions of a county charter providing that the county governing board shall be composed of the supervisors of

the several towns and that each supervisor shall have one vote. The county charter is similar to a local ordinance, a challenge to which cannot support a three-judge court. The fact that the charter was enacted into state law does not change the result. The charter provisions plainly relate only to one county and the statute enacting the charter is similarly limited. It does not remotely resemble a state statute of general, statewide application. It is a statute dealing solely with matters of local concern. Nor was the action brought against "state officers" within the meaning of the statute; it was brought to enjoin local officers acting solely with reference to local matters.

It is argued, however, that the alleged malapportionment reflected in the charter is also reflected in § 150 and § 153 of the New York County Law, which does have a statewide application, and that the provisions of the charter here challenged are actually interchangeable with § 150 and § 153 of the County Law.[1] It is also argued that to get rid of this alleged malapportionment the Court would have to declare unconstitutional not only the provisions of the charter but also § 150 and

[1] Section 150 of the N. Y. County Law (1950) provides that "[t]he supervisors of the several cities and towns in each county . . . shall constitute the board of supervisors of the county" and § 153 subd. 4 provides for a majority vote of the supervisors with respect to actions of the Board of Supervisors where "no proportion of the voting strength for such action is otherwise prescribed." But § 2 of the N. Y. County Law provides that the provisions of the law shall not apply "in so far as they are in conflict with or in limitation of a provision of any alternative form of county government . . . adopted by a county pursuant to section two of article nine of the constitution, or any . . . county government law or civil divisions act enacted by the legislature and applicable to such county . . . , or in conflict with any local law . . . adopted by a county under an optional or alternative form of county government . . . unless a contrary intent is expressly stated in [the law]."

§ 153 of the County Law. The complaint, however, challenges only the charter. It makes no challenge of any statewide law. And the three-judge court considered it as an attack only on the charter. 256 F. Supp. 617.[2]

We therefore do not accept the invitation to get into the niceties of the relationship between the provisions of the charter and the New York County Law, but take the complaint as we find it for purposes of the jurisdictional question, and conclude on the face of the complaint that we have only an alleged malapportionment under a county charter.

Since the "statute" in each of these cases is one of limited application, concerning only a particular county involved in the litigation, a three-judge court was improperly convened. Appeals should, therefore, have been taken to the respective Courts of Appeals, not to this Court. Since the time for perfecting those appeals may have passed, we vacate the judgments and remand the causes to the court which heard each case so that they may enter a fresh decree from which appellants may, if they wish, perfect timely appeals to the respective Courts of Appeals. *Phillips* v. *United States, supra,* at 254.

Decrees vacated.

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[2] And see *Bianchi* v. *Griffing,* 238 F. Supp. 997, where the three-judge court in this case denied the motion to dismiss and denied the motion for an injunction against the continued operation of the Board, pending legislative or other political action to correct the alleged malapportionment.

SAILORS ET AL. *v.* BOARD OF EDUCATION OF THE COUNTY OF KENT ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN.

No. 430. Argued April 17–18, 1967.—Decided May 22, 1967.

Appellants brought this suit seeking, *inter alia*, to enjoin as violative of the Fourteenth Amendment enforcement of a Michigan statute under which appellee school board and other county school boards are chosen—not by the electors of the county, but by delegates from the local boards from candidates nominated by school electors. A three-judge district court, rejecting appellants' contention that the system paralleled the county-unit system invalidated in *Gray* v. *Sanders*, 372 U. S. 368, dismissed the complaint. *Held:*

1. A three-judge court was properly convened since the challenged statute has general and statewide application. *Moody* v. *Flowers, ante*, p. 97, distinguished. P. 107.

2. There is no constitutional reason why nonlegislative state or local officials may not be chosen otherwise than by elections. The functions of appellee school board are essentially administrative and the elective-appointive system used to select its members is well within the State's latitude in the selection of such officials. Pp. 107–111.

254 F. Supp. 17, affirmed.

Wendell A. Miles argued the cause for appellants. With him on the brief was *Roger D. Anderson.*

Paul O. Strawhecker argued the cause for appellees and filed a brief for Kentwood Public Schools. With him on the brief for the Board of Education of the County of Kent was *George R. Cook.* On the brief for appellee the Attorney General of Michigan, were *Robert A. Derengoski*, Solicitor General, and *Eugene Krasicky*, Assistant Attorney General.

Francis X. Beytagh, Jr., argued the cause *pro hac vice* for the United States, as *amicus curiae*, urging reversal.

With him on the brief were *Solicitor General Marshall, Assistant Attorney General Doar* and *Bruce J. Terris.*

Briefs of *amici curiae* were filed by *Louis J. Lefkowitz,* Attorney General, *pro se,* and *Daniel M. Cohen, Robert W. Imrie* and *George D. Zuckerman,* Assistant Attorneys General, for the Attorney General of the State of New York, and by *Morris H. Schneider* and *Seymour S. Ross* for the County of Nassau.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Appellants, qualified and registered electors of Kent County, Michigan, brought this suit in the Federal District Court to enjoin the Board of Education of Kent County from detaching certain schools from the city of Grand Rapids and attaching them to Kent County, to declare the county board to be unconstitutionally constituted, and to enjoin further elections until the electoral system is redesigned. Attack is also made on the adequacy of the statutory standards governing decisions of the county board in light of the requirements of due process. We need not bother with the intricate problems of state law involved in the dispute. For the federal posture of the case is a very limited one. The people of Michigan (qualified school electors) elect the local school boards.[1] No constitutional question is presented as respects those elections. The alleged constitutional questions arise when it comes to the county school board. It is chosen, not by the electors of the county, but by delegates from the local boards. Each board sends a delegate to a biennial meeting and those delegates elect

[1] In Michigan the members of the local school district's board are elected by popular vote of the residents of the district. See Mich. Stat. Ann. § 15.3023 (1959); Mich. Stat. Ann. §§ 15.3027, 15.3055, 15.3056, 15.3107, 15.3148, 15.3188, 15.3511 (Supp. 1965).

a county board of five members, who need not be members of the local boards,[2] from candidates nominated by school electors. It is argued that this system of choosing county board members parallels the county-unit system which we invalidated under the Equal Protection Clause of the Fourteenth Amendment in *Gray* v. *Sanders*, 372 U. S. 368, and violates the principle of "one man, one vote" which we held in that case and in *Reynolds* v. *Sims*, 377 U. S. 533, was constitutionally required in state elections. A vast array of facts is assembled showing alleged inequities in a system which gives one vote to every local school board (irrespective of population, wealth, etc.) in the selection of the county board. A three-judge court was convened, and it held by a divided vote that the method of constitution of the county board did not violate the Fourteenth Amendment. 254 F. Supp. 17. We noted probable jurisdiction, 385 U. S. 966.

We conclude that a three-judge court was properly convened, for unlike the situation in *Moody* v. *Flowers*, *ante*, p. 97, this is a case where the state statute that is challenged[3] applies generally to all Michigan county school boards of the type described.

We start with what we said in *Reynolds* v. *Sims*, *supra*, at 575:

> "Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental

[2] Mich. Stat. Ann. §§ 15.3294 (1), 15.3295 (1) (Supp. 1965). By Mich. Stat. Ann. §§ 15.3294 (2)–15.3294 (6) (Supp. 1965), members of the county board may be chosen at popular elections provided the board submits the matter to a referendum and the people approve. So far as we are advised, no such referendum has been held; and the membership of the county board, here challenged, was constituted by electors chosen by the local boards.

[3] Mich. Stat. Ann. § 15.3294 (1) (Supp. 1965).

> instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in *Hunter* v. *City of Pittsburgh*, 207 U. S. 161, 178, these governmental units are 'created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them,' and the 'number, nature and duration of the powers conferred upon [them] . . . and the territory over which they shall be exercised rests in the absolute discretion of the State.'"

We find no constitutional reason why state or local officers of the nonlegislative character involved here may not be chosen by the governor, by the legislature, or by some other appointive means rather than by an election. Our cases have, in the main, dealt with elections for United States Senator or Congressman (*Gray* v. *Sanders*, *supra*; *Wesberry* v. *Sanders*, 376 U. S. 1) or for state officers[4] (*Gray* v. *Sanders*, *supra*) or for state legislators. *Reynolds* v. *Sims*, *supra*; *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633; *Davis* v. *Mann*, 377 U. S. 678; *Roman* v. *Sincock*, 377 U. S. 695; *Lucas* v. *Colorado Gen. Assembly*, 377 U. S. 713; *Marshall* v. *Hare*, 378 U. S. 561.

They were all cases where elections had been provided and cast no light on when a State must provide for the election of local officials.

A State cannot of course manipulate its political subdivisions so as to defeat a federally protected right, as for example, by realigning political subdivisions so as to deny a person his vote because of race.[5] *Gomillion* v. *Light-*

[4] The officers in *Gray* v. *Sanders* were: U. S. Senator, Governor, Lieutenant Governor, Justice of the Supreme Court, Judge of the Court of Appeals, Secretary of State, Attorney General, Comptroller General, Commissioner of Labor, and Treasurer.

[5] Nor can the restraints imposed by the Constitution on the States be circumvented by local bodies to whom the State delegates authority. *Standard Computing Scale Co.* v. *Farrell*, 249 U. S. 571, 577; *Cooper* v. *Aaron*, 358 U. S. 1, 17.

foot, 364 U. S. 339, 345. Yet as stated in *Anderson* v. *Dunn*, 6 Wheat. 204, 226:

> "The science of government is the most abstruse of all sciences; if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment."

If we assume *arguendo* that where a State provides for an election of a local official or agency, the requirements of *Gray* v. *Sanders* and *Reynolds* v. *Sims* must be met, we are still short of an answer to the present problem and that is whether Michigan may allow its county school boards to be appointed.

When we stated ". . . the state legislatures have constitutional authority to experiment with new techniques" (*Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, 423), we were talking about the Due Process Clause of the Fourteenth Amendment, as was Mr. Justice Holmes, dissenting in *Lochner* v. *New York*, 198 U. S. 45, 75, when he said ". . . a constitution is not intended to embody . . . the organic relation of the citizen to the State . . . ." But as we indicated in *Gomillion* v. *Lightfoot*, *supra*, it is precisely that same approach that we have taken when it comes to municipal and county arrangements within the framework of a State. Save and unless the state, county, or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs.

The Michigan system for selecting members of the county school board is basically appointive rather than elective.[6] We need not decide at the present time whether

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[6] The delegates from the local school boards, not the school electors, select the members of the county school board. While the school electors elect the members of the local school boards

a State may constitute a local legislative body through the appointive rather than the elective process. We reserve that question for other cases such as *Board of Supervisors* v. *Bianchi, ante,* p. 97, which we have disposed of on jurisdictional grounds. We do not have that question here, as the County Board of Education performs essentially administrative functions; [7] and while they are important, they are not legislative in the classical sense.

Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing

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and the local school boards, in turn, select delegates to attend the meeting at which the county board is selected, the delegates need not cast their votes in accord with the expressed preferences of the school electors. There is not even a formal method by which a delegate can determine the preferences of the people in his district. It is evident, therefore, that the membership of the county board is not determined, directly or indirectly, through an election in which the residents of the county participate. The "electorate" under the Michigan system is composed not of the people of the county, but the delegates from the local school boards.

[7] The authority of the county board includes the appointment of a county school superintendent (Mich. Stat. Ann. § 15.3298 (1)(b) (Supp. 1965)), preparation of an annual budget and levy of taxes (Mich. Stat. Ann. § 15.3298 (1)(c) (Supp. 1965)), distribution of delinquent taxes (Mich. Stat. Ann. § 15.3298 (1)(d) (Supp. 1965)), furnishing consulting or supervisory services to a constituent school district upon request (Mich. Stat. Ann. § 15.3298 (1)(g) (Supp. 1965)), conducting cooperative educational programs on behalf of constituent school districts which request such services (Mich. Stat. Ann. § 15.3298 (1)(i) (Supp. 1965)), and with other intermediate school districts (Mich. Stat. Ann. § 15.3298 (1)(j) (Supp. 1965)), employment of teachers for special educational programs (Mich. Stat. Ann. § 15.3298 (1)(h) (Supp. 1965)), and establishing, at the direction of the Board of Supervisors, a school for children in the juvenile homes (Mich. Stat. Ann. § 15.3298 (1)(k) (Supp. 1965)). One of the board's most sensitive functions, and the one giving rise to this litigation, is the power to transfer areas from one school district to another. Mich. Stat. Ann. § 15.3461 (1959).

urban conditions. We see nothing in the Constitution to prevent experimentation. At least as respects nonlegislative officers, a State can appoint local officials or elect them or combine the elective and appointive systems as was done here. If we assume *arguendo* that where a State provides for an election of a local official or agency—whether administrative, legislative, or judicial—the requirements of *Gray* v. *Sanders* and *Reynolds* v. *Sims* must be met, no question of that character is presented. For while there was an election here for the local school board, no constitutional complaint is raised respecting that election. Since the choice of members of the county school board did not involve an election and since none was required for these nonlegislative offices, the principle of "one man, one vote" has no relevancy.

Affirmed.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART concur in the result.

DUSCH ET AL. *v.* DAVIS ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 724. Argued April 17–18, 1967.—Decided May 22, 1967.

Appellees brought this suit against local and state officials seeking to enjoin as invidiously discriminatory a local government plan embodied in state law under which the City of Virginia Beach, Virginia, was consolidated with Princess Anne County to form seven boroughs, which vary considerably in population. Under the Seven-Four Plan of the amended charter involved herein the new city council consists of 11 members, each of whom is elected at large. Four are elected without regard to residence; each of the seven others must reside in a different borough. A three-judge court previously convened, holding that it had no jurisdiction, transferred the case to the District Court. That court's approval of the plan was reversed by the Court of Appeals. *Held:*

1. Since the charter is local and not statewide, this case is not one for a three-judge court. *Moody* v. *Flowers, ante,* p. 97, followed. P. 114.

2. An otherwise nondiscriminatory plan is not invalid because it uses boroughs "merely as the basis of residence for candidates, not for voting or representation" (*Fortson* v. *Dorsey,* 379 U. S., at 438), since each councilman represents the city as a whole and not just the borough where he resides. Pp. 114–117.

361 F. 2d 495, reversed.

Harry Frazier III argued the cause for appellants. With him on the briefs was *Archibald G. Robertson.*

Henry E. Howell, Jr., argued the cause and filed a brief for appellees.

Francis X. Beytagh, Jr., argued the cause *pro hac vice* for the United States, as *amicus curiae,* urging affirmance. With him on the brief were *Solicitor General*

Marshall, Assistant Attorney General Doar and *Bruce J. Terris.*

Briefs of *amici curiae* were filed by *Louis J. Lefkowitz,* Attorney General, *pro se,* and *Daniel M. Cohen, Robert W. Imrie* and *George D. Zuckerman,* Assistant Attorneys General, for the Attorney General of the State of New York, and by *Morris H. Schneider* and *Seymour S. Ross* for the County of Nassau.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In 1963 the City of Virginia Beach, Virginia, consolidated with adjoining Princess Anne County, which was both rural and urban; and a borough form of government was adopted. There are seven boroughs, one corresponding to the boundaries of the former city and six corresponding to the boundaries of the six magisterial districts. The consolidation plan was effected pursuant to Virginia law [1] and the charter embodied in the plan was approved by the legislature.[2]

Three boroughs—Bayside, Kempsville, and Lynnhaven—are primarily urban. Three—Blackwater, Princess Anne, and Pungo—are primarily rural. The borough of Virginia Beach, centering around its famous ocean beach and bay, is primarily tourist.

Electors of five boroughs, having exhausted attempts to obtain relief in the state courts,[3] instituted this suit against local and state officials claiming that the consolidation plan in its distribution of voting rights violated the principle of *Reynolds* v. *Sims,* 377 U. S. 533, and

[1] Va. Code 1950, Tit. 15, Art. 4, c. 9 (1956 Repl. Vol.).

[2] Va. Acts 1962, c. 147. The consolidation plan was an interim one, the idea being that another system would be initiated not sooner than 1968 and not later than 1971.

[3] *Davis* v. *Dusch,* 205 Va. 676, 139 S. E. 2d 25.

asking for the convening of a three-judge court. The three-judge court held that its jurisdiction had not been established because the issue was local in character and transferred the cause to the District Court.

The District Court held the original allocation invalid as denying voter equality and stayed further proceedings to allow the city an opportunity to seek a charter amendment at the 1966 session of the State Legislature. The charter was amended to provide for the Seven-Four Plan now being challenged.[4] Under the amended charter, the council is composed of 11 members. Four members are elected at large without regard to residence. Seven are elected by the voters of the entire city, one being required to reside in each of the seven boroughs. Pursuant to leave of the District Court, appellees filed an amended complaint challenging the validity of the Seven-Four Plan. The District Court approved this plan. The Court of Appeals reversed, 361 F. 2d 495. The case is here on appeal (28 U. S. C. § 1254 (2)) and we postponed the question of jurisdiction to the merits. 385 U. S. 999.

For the reasons stated in *Moody* v. *Flowers, ante,* p. 97, the case is not one for a three-judge court, the charter being local only and not of statewide application.

In *Sailors* v. *Board of Education, ante,* p. 105, we reserved the question whether the apportionment of municipal or county legislative agencies is governed by *Reynolds* v. *Sims.* But though we assume *arguendo* that it is, we reverse the Court of Appeals. It felt that *Reynolds* v. *Sims* required "that each legislator, State or municipal, represent a reasonably like number in population," 361 F. 2d, at 497, pointing out that Blackwater, where 733 people live, will have the same representation as Lynnhaven with 23,731 and Bayside with 29,048 and Kempsville with 13,900. The Court of Appeals reaffirmed

[4] Va. Acts 1966, c. 39.

what it had decided in *Ellis* v. *Mayor and City Council of Baltimore,* 352 F. 2d 123, 128, that "the fundamental principle of representative government in this country is one of equal representation for *equal numbers of people,* without regard to race, sex, economic status, or place of residence within a State." And the court held that the provision for four city-wide members "does not remedy or in any way affect the disproportion of representation of the 7 borough members." 361 F. 2d, at 497.

The Seven-Four Plan makes no distinction on the basis of race, creed, or economic status or location. Each of the 11 councilmen is elected by a vote of all the electors in the city. The fact that each of the seven councilmen must be a resident of the borough from which he is elected, is not fatal. In upholding a residence requirement for the election of state senators from a multi-district county we said in *Fortson* v. *Dorsey,* 379 U. S. 433, 438:

> "It is not accurate to treat a senator from a multi-district county as the representative of only that district within the county wherein he resides. The statute uses districts in multi-district counties merely as the basis of residence for candidates, not for voting or representation. Each district's senator must be a resident of that district, but since his tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all the people in the county, and not merely those of people in his home district; thus in fact he is the county's and not merely the district's senator."

By analogy the present consolidation plan uses boroughs in the city "merely as the basis of residence for candidates, not for voting or representation." He is nonetheless the city's, not the borough's, councilman. In *Fortson* there was substantial equality of population in

the senatorial districts, while here the population of the boroughs varies widely. If a borough's resident on the council represented in fact only the borough, residence being only a front, different conclusions might follow. But on the assumption that *Reynolds* v. *Sims* controls, the constitutional test under the Equal Protection Clause is whether there is an "invidious" discrimination. 377 U. S., at 561. As stated by the District Court:

> "The principal and adequate reason for providing for the election of one councilman from each borough is to assure that there will be members of the City Council with some general knowledge of rural problems to the end that this heterogeneous city will be able to give due consideration to questions presented throughout the entire area.
>
> . . . . . .
>
> "[T]he history—past and present—of the area and population now comprising the City of Virginia Beach demonstrates the compelling need, at least during an appreciable transition period, for knowledge of rural problems in handling the affairs of one of the largest area-wide cities in the United States. Bluntly speaking, there is a vast area of the present City of Virginia Beach which should never be referred to as a city. District representation from the old County of Princess Anne with elected members of the Board of Supervisors selected only by the voters of the particular district has now been changed to permit city-wide voting. The 'Seven-Four Plan' is not an evasive scheme to avoid the consequences of reapportionment or to perpetuate certain persons in office. The plan does not preserve any controlling influence of the smaller boroughs, but does indicate a desire for intelligent expression of views on subjects relating to agriculture which remains a great eco-

> nomic factor in the welfare of the entire population. As the plan becomes effective, if it then operates to minimize or cancel out the voting strength of racial or political elements of the voting population, it will be time enough to consider whether the system still passes constitutional muster."

The Seven-Four Plan seems to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megalopolis in relation to the city, the suburbia, and the rural countryside.[5] Finding no invidious discrimination we conclude that the judgment of the Court of Appeals must be and is

Reversed.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART concur in the result.

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[5] The populations of the seven boroughs are:

Blackwater	733
Pungo	2,504
Princess Anne	7,211
Kempsville	13,900
Lynnhaven	23,731
Bayside	29,048
Virginia Beach	8,091

It is obvious that, if the percentage of qualified voters is in accord with the population, Lynnhaven and Bayside, if united in their efforts, could elect all 11 councilmen even though the election were at large.

262-921 O - 68 - 11

BOUTILIER *v.* IMMIGRATION AND NATURALIZATION SERVICE.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 440. Argued March 14, 1967.—Decided May 22, 1967.

Petitioner, an alien who at the time of his entry into the United States was a homosexual, *held* excludable under § 212 (a) (4) of the Immigration and Nationality Act of 1952, as one "afflicted with [a] psychopathic personality," a term which Congress clearly intended to include homosexuals. Pp. 120–125.

363 F. 2d 488, affirmed.

Blanch Freedman argued the cause for petitioner. With her on the briefs was *Robert Brown.*

Nathan Lewin argued the cause for respondent. On the brief were *Solicitor General Marshall, Assistant Attorney General Vinson* and *Philip R. Monahan.*

Briefs of *amici curiae,* urging reversal, were filed by *David Carliner, Nanette Dembitz* and *Alan H. Levine* for the American Civil Liberties Union et al., and by the Homosexual Law Reform Society of America.

MR. JUSTICE CLARK delivered the opinion of the Court.

The petitioner, an alien, has been ordered deported to Canada as one who upon entry into this country was a homosexual and therefore "afflicted with psychopathic personality" and excludable under § 212 (a) (4) of the Immigration and Nationality Act of 1952, 66 Stat. 182, 8 U. S. C. § 1182 (a) (4).* Petitioner's appeal from the

*"SEC. 212. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

. . . . . .

"(4) Aliens afflicted with psychopathic personality, epilepsy, or a mental defect . . . ."

Section 241 (a) (1) of the Immigration and Nationality Act, 66 Stat. 204, 8 U. S. C. § 1251 (a) (1), provides that: "Any alien in

finding of the Special Inquiry Officer was dismissed by the Board of Immigration Appeals, without opinion, and his petition for review in the Court of Appeals was dismissed, with one judge dissenting. 363 F. 2d 488. It held that the term "psychopathic personality," as used by the Congress in § 212 (a)(4), was a term of art intended to exclude homosexuals from entry into the United States. It further found that the term was not void for vagueness and was, therefore, not repugnant to the Fifth Amendment's Due Process Clause. We granted certiorari, 385 U. S. 927, and now affirm.

I.

Petitioner, a Canadian national, was first admitted to this country on June 22, 1955, at the age of 21. His last entry was in 1959, at which time he was returning from a short trip to Canada. His mother and stepfather and three of his brothers and sisters live in the United States. In 1963 he applied for citizenship and submitted to the Naturalization Examiner an affidavit in which he admitted that he was arrested in New York in October 1959, on a charge of sodomy, which was later reduced to simple assault and thereafter dismissed on default of the complainant. In 1964, petitioner, at the request of the Government, submitted another affidavit which revealed the full history of his sexual deviate behavior. It stated that his first homosexual experience occurred when he was 14 years of age, some seven years before his entry into the United States. Petitioner was evidently a passive participant in this encounter. His next episode was at age 16 and occurred in a public park in Halifax, Nova Scotia. Petitioner was the active participant in this affair. During the next five years immediately preceding

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his first entry into the United States petitioner had homosexual relations on an average of three or four times a year. He also stated that prior to his entry he had engaged in heterosexual relations on three or four occasions. During the eight and one-half years immediately subsequent to his entry, and up to the time of his second statement, petitioner continued to have homosexual relations on an average of three or four times a year. Since 1959 petitioner had shared an apartment with a man with whom he had had homosexual relations.

The 1964 affidavit was submitted to the Public Health Service for its opinion as to whether petitioner was excludable for any reason at the time of his entry. The Public Health Service issued a certificate in 1964 stating that in the opinion of the subscribing physicians petitioner "was afflicted with a class A condition, namely, psychopathic personality, sexual deviate" at the time of his admission. Deportation proceedings were then instituted. "No serious question," the Special Inquiry Officer found, "has been raised either by the respondent [petitioner here], his counsel or the psychiatrists [employed by petitioner] who have submitted reports on the respondent as to his sexual deviation." Indeed, the officer found that both of petitioner's psychiatrists "concede that the respondent has been a homosexual for a number of years but conclude that by reason of such sexual deviation, the respondent is not a psychopathic personality." Finding against petitioner on the facts, the issue before the officer was reduced to the purely legal question of whether the term "psychopathic personality" included homosexuals and if it suffered illegality because of vagueness.

II.

The legislative history of the Act indicates beyond a shadow of a doubt that the Congress intended the phrase "psychopathic personality" to include homosexuals such as petitioner.

Prior to the 1952 Act the immigration law excluded "persons of constitutional psychopathic inferiority." 39 Stat. 875, as amended, 8 U. S. C. § 136 (a) (1946 ed.). Beginning in 1950, a subcommittee of the Senate Committee on the Judiciary conducted a comprehensive study of the immigration laws and in its report found "that the purpose of the provision against 'persons with constitutional psychopathic inferiority' will be more adequately served by changing that term to 'persons afflicted with psychopathic personality,' and that the classes of mentally defectives should be enlarged to include homosexuals and other sex perverts." S. Rep. No. 1515, 81st Cong., 2d Sess., p. 345. The resulting legislation was first introduced as S. 3455 and used the new phrase "psychopathic personality." The bill, however, contained an additional clause providing for the exclusion of aliens "who are homosexuals or sex perverts." As the legislation progressed (now S. 2550 in the 82d Congress), however, it omitted the latter clause "who are homosexuals or sex perverts" and used only the phrase "psychopathic personality." The omission is explained by the Judiciary Committee Report on the bill:

> "The provisio[n] of S. 716 [one of the earlier bills not enacted] which specifically excluded homosexuals and sex perverts as a separate excludable class does not appear in the instant bill. The Public Health Service has advised that the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect which appears in the instant bill is sufficiently broad to provide for the exclusion of homosexuals and sex perverts. *This change of nomenclature is not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates.*" (Emphasis supplied.) S. Rep. No. 1137, 82d Cong., 2d Sess., p. 9.

Likewise, a House bill, H. R. 5678, adopted the position of the Public Health Service that the phrase "psychopathic personality" excluded from entry homosexuals and sex perverts. The report that accompanied the bill shows clearly that the House Judiciary Committee adopted the recommendation of the Public Health Service that "psychopathic personality" should be used in the Act as a phrase that would exclude from admission homosexuals and sex perverts. H. R. Rep. No. 1365, 82d Cong., 2d Sess. It quoted at length, and specifically adopted, the Public Health Service report which recommended that the term "psychopathic personality" be used to "specify such types of pathologic behavior as homosexuality or sexual perversion." We, therefore, conclude that the Congress used the phrase "psychopathic personality" not in the clinical sense, but to effectuate its purpose to exclude from entry all homosexuals and other sex perverts.

Petitioner stresses that only persons *afflicted* with psychopathic personality are excludable. This, he says, is "a condition, physical or psychiatric, which may be manifested in different ways, including sexual behavior." Petitioner's contention must fall by his own admissions. For over six years prior to his entry petitioner admittedly followed a continued course of homosexual conduct. The Public Health Service doctors found and certified that at the time of his entry petitioner "was afflicted with a class A condition, namely, psychopathic personality, sexual deviate . . . ." It was stipulated that if these doctors were to appear in the case they would testify to this effect and that "no useful purpose would be served by submitting this additional psychiatric material [furnished by petitioner's doctors] to the United States Public Health Service . . . ." The Government clearly established that petitioner was a homosexual at entry. Having substantial support in the record, we do not now disturb that finding, especially since petitioner admitted

being a homosexual at the time of his entry. The existence of this condition over a continuous and uninterrupted period prior to and at the time of petitioner's entry clearly supports the ultimate finding upon which the order of deportation was based.

III.

Petitioner says, even so, the section as construed is constitutionally defective because it did not adequately warn him that his sexual affliction at the time of entry could lead to his deportation. It is true that this Court has held the "void for vagueness" doctrine applicable to civil as well as criminal actions. See *Small Co.* v. *Am. Sugar Ref. Co.*, 267 U. S. 233, 239 (1925). However, this is where "the exaction of obedience to a rule or standard . . . was so vague and indefinite as really to be no rule or standard at all. . . ." In short, the exaction must strip a participant of his rights to come within the principle of the cases. But the "exaction" of § 212 (a)(4) never applied to petitioner's conduct after entry. The section imposes neither regulation of nor sanction for conduct. In this situation, therefore, no necessity exists for guidance so that one may avoid the applicability of the law. The petitioner is not being deported for conduct engaged in after his entry into the United States, but rather for characteristics he possessed *at the time of* his entry. Here, when petitioner first presented himself at our border for entrance, he was already afflicted with homosexuality. The pattern was cut, and under it he was not admissible.

The constitutional requirement of fair warning has no applicability to standards such as are laid down in § 212 (a)(4) for admission of aliens to the United States. It has long been held that the Congress has plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden. See *The Chinese Exclusion Case,*

130 U. S. 581 (1889). Here Congress commanded that homosexuals not be allowed to enter. The petitioner was found to have that characteristic and was ordered deported. The basis of the deportation order was his affliction for a long period of time *prior to entry, i. e.,* six and one-half years before his entry. It may be, as some claim, that "psychopathic personality" is a medically ambiguous term, including several separate and distinct afflictions. Noyes, Modern Clinical Psychiatry 410 (3d ed. 1948). But the test here is what the Congress intended, not what differing psychiatrists may think. It was not laying down a clinical test, but an exclusionary standard which it declared to be inclusive of those having homosexual and perverted characteristics. It can hardly be disputed that the legislative history of § 212 (a)(4) clearly shows that Congress so intended.

But petitioner says that he had no warning and that no interpretation of the section had come down at the time of his 1955 entry. Therefore, he argues, he was unaware of the fact that homosexual conduct engaged in after entry could lead to his deportation. We do not believe that petitioner's post-entry conduct is the basis for his deportation order. At the time of his first entry he had continuously been afflicted with homosexuality for over six years. To us the statute is clear. It fixes "the time of entry" as the crucial date and the record shows that the findings of the Public Health Service doctors and the Special Inquiry Officer all were based on that date. We find no indication that the post-entry evidence was of any consequence in the ultimate decision of the doctors, the hearing officer or the court. Indeed, the proof was uncontradicted as to petitioner's characteristic at the time of entry and this brought him within the excludable class. A standard applicable solely to time of entry could hardly be vague as to post-entry conduct.

The petitioner raises other points, including the claim that an "arriving alien" under the Act is entitled to medical examination. Since he is not an "arriving alien" subject to exclusion, but a deportable alien within an excludable class—who through error was permitted entry—it is doubtful if the requirement would apply. But we need not go into the question since petitioner was twice offered examination and refused to submit himself. He can hardly be heard to complain now. The remaining contentions are likewise without merit.

Affirmed.

MR. JUSTICE BRENNAN dissents for the reasons stated by Judge Moore of the Court of Appeals, 363 F. 2d 488, 496–499.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE FORTAS concurs, dissenting.

The term "psychopathic personality" is a treacherous one like "communist" or in an earlier day "Bolshevik." A label of this kind when freely used may mean only an unpopular person. It is much too vague by constitutional standards for the imposition of penalties or punishment.

Cleckley defines "psychopathic personality" as one who has the following characteristics:

> (1) Superficial charm and good "intelligence." (2) Absence of delusions and other signs of irrational "thinking." (3) Absence of "nervousness" or psychoneurotic manifestations. (4) Unreliability. (5) Untruthfulness and insincerity. (6) Lack of remorse or shame. (7) Inadequately motivated antisocial behavior. (8) Poor judgment and failure to learn by experience. (9) Pathologic egocentricity and incapacity for love. (10) General poverty in major affective reactions. (11) Specific loss of insight.

(12) Unresponsiveness in general interpersonal relations. (13) Fantastic and uninviting behavior with drink and sometimes without. (14) Suicide rarely carried out. (15) Sex life impersonal, trivial and poorly integrated. (16) Failure to follow any life plan. Cleckley, The Mask of Sanity 238–255 (1941).

The word "psychopath" according to some means "a sick mind." Guttmacher & Weihofen, Psychiatry and the Law 86 (1952):

> "In the light of present knowledge, most of the individuals called psychopathic personalities should probably be considered as suffering from neurotic character disorders. They are, for the most part, unhappy persons, harassed by tension and anxiety, who are struggling against unconscious conflicts which were created during the very early years of childhood. The nature and even the existence of these conflicts which drive them restlessly on are unknown to them. When the anxiety rises to a certain pitch, they seek relief through some antisocial act. The frequency with which this pattern recurs in the individual is dependent in part upon the intensity of the unconscious conflict, upon the tolerance for anxiety, and upon chance environmental situations which may heighten or decrease it. One of the chief diagnostic criteria of this type of neurotically determined delinquency is the repetitiveness of the pattern. The usual explanation, as for example, that the recidivistic check-writer has just 'got in the habit of writing bad checks' is meaningless." *Id.*, at 88–89.

Many experts think that it is a meaningless designation. "Not yet is there any common agreement . . . as to classification or . . . etiology." Noyes, Modern Clinical Psychiatry 410 (3d ed. 1948). "The only conclusion that seems warrantable is that, at some time or

other and by some reputable authority, the term psychopathic personality has been used to designate every conceivable type of abnormal character." Curran & Mallinson, Psychopathic Personality, 90 J. Mental Sci. 266, 278. See also Guttmacher, Diagnosis and Etiology of Psychopathic Personalities as Perceived in Our Time, in Current Problems in Psychiatric Diagnosis 139, 154 (Hoch & Zubin ed. 1953); Tappan, Sexual Offences and the Treatment of Sexual Offenders in the United States, in Sexual Offences 500, 507 (Radzinowicz ed. 1957). It is much too treacherously vague a term to allow the high penalty of deportation to turn on it.

When it comes to sex, the problem is complex. Those "who fail to reach sexual maturity (hetero-sexuality), and who remain at a narcissistic or homosexual stage" are the products "of heredity, of glandular dysfunction, [or] of environmental circumstances." Henderson, Psychopathic Constitution and Criminal Behaviour, in Mental Abnormality and Crime 105, 114 (Radzinowicz & Turner ed. 1949).

The homosexual is one, who by some freak, is the product of an arrested development:

> "All people have originally bisexual tendencies which are more or less developed and which in the course of time normally deviate either in the direction of male or female. This may indicate that a trace of homosexuality, no matter how weak it may be, exists in every human being. It is present in the adolescent stage, where there is a considerable amount of undifferentiated sexuality." Abrahamsen, Crime and the Human Mind 117 (1944).

Many homosexuals become involved in violations of laws; many do not. Kinsey reported:

> "It is not possible to insist that any departure from the sexual mores, or any participation in socially taboo activities, always, or even usually, in-

volves a neurosis or psychosis, for the case histories abundantly demonstrate that most individuals who engage in taboo activities make satisfactory social adjustments. There are, in actuality, few adult males who are particularly disturbed over their sexual histories. Psychiatrists, clinical psychologists, and others who deal with cases of maladjustment, sometimes come to feel that most people find difficulty in adjusting their sexual lives; but a clinic is no place to secure incidence figures. The incidence of tuberculosis in a tuberculosis sanitarium is no measure of the incidence of tuberculosis in the population as a whole; and the incidence of disturbance over sexual activities, among the persons who come to a clinic, is no measure of the frequency of similar disturbances outside of clinics. The impression that such 'sexual irregularities' as 'excessive' masturbation, pre-marital intercourse, responsibility for a pre-marital pregnancy, extra-marital intercourse, mouth-genital contacts, homosexual activity, or animal intercourse, always produce psychoses and abnormal personalities is based upon the fact that the persons who do go to professional sources for advice are upset by these things.

"It is unwarranted to believe that particular types of sexual behavior are always expressions of psychoses or neuroses. In actuality, they are more often expressions of what is biologically basic in mammalian and anthropoid behavior, and of a deliberate disregard for social convention. Many of the socially and intellectually most significant persons in our histories, successful scientists, educators, physicians, clergymen, business men, and persons of high position in governmental affairs, have socially taboo items in their sexual histories, and among them they have accepted nearly the whole range

> of so-called sexual abnormalities. Among the socially most successful and personally best adjusted persons who have contributed to the present study, there are some whose rates of outlet are as high as those in any case labelled nymphomania or satyriasis in the literature, or recognized as such in the clinic." Kinsey, Sexual Behavior in the Human Male 201–202 (1948).

It is common knowledge that in this century homosexuals have risen high in our own public service—both in Congress and in the Executive Branch—and have served with distinction. It is therefore not credible that Congress wanted to deport everyone and anyone who was a sexual deviate, no matter how blameless his social conduct had been nor how creative his work nor how valuable his contribution to society. I agree with Judge Moore, dissenting below, that the legislative history should not be read as imputing to Congress a purpose to classify under the heading "psychopathic personality" every person who had ever had a homosexual experience:

> "Professor Kinsey estimated that 'at least 37 per cent' of the American male population has at least one homosexual experience, defined in terms of physical contact to the point of orgasm, between the beginning of adolescence and old age.[1] Kinsey, Pom-

[1] "Homosexual activity in the human male is much more frequent than is ordinarily realized . . . . In the youngest unmarried group, more than a quarter (27.3%) of the males have some homosexual activity to the point of orgasm . . . . The incidence among these single males rises in successive age groups until it reaches a maximum of 38.7 per cent between 36 and 40 years of age.

"High frequencies do not occur as often in the homosexual as they do in some other kinds of sexual activity . . . . Populations are more homogeneous in regard to this outlet. This may reflect the difficulties involved in having frequent and regular relations in a socially taboo activity. Nevertheless, there are a few of the younger adolescent males who have homosexual frequencies of 7 or more per

eroy & Martin, Sexual Behavior in the Human Male 623 (1948). Earlier estimates had ranged from one per cent to 100 per cent. Id. at 616–622. The sponsors of Britain's current reform bill on homosexuality have indicated that one male in 25 is a homosexual in Britain.[2] To label a group so large 'excludable aliens' would be tantamount to saying that Sappho, Leonardo da Vinci, Michelangelo, Andre Gide, and perhaps even Shakespeare, were they to come to life again, would be deemed unfit to visit our shores.[3] Indeed, so broad a definition might well comprise more than a few members of legislative bodies." 363 F. 2d 488, 497–498.

The Public Health Service, from whom Congress borrowed the term "psychopathic personality" (H. R. Rep. No. 1365, 82d Cong., 2d Sess., 46–47) admits that the term is "vague and indefinite." *Id.*, at 46.

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week, and between 26 and 30 the maximum frequencies run to 15 per week. By 50 years of age the most active individual is averaging only 5.0 per week.

"For single, active populations, the mean frequencies of homosexual contacts . . . rise more or less steadily from near once per week . . . for the younger adolescent boys to nearly twice as often . . . for males between the ages of 31 and 35. They stand above once a week through age 50." Kinsey, Sexual Behavior in the Human Male 259–261 (1948).

[2] Report, Committee on Homosexual Offenses and Prostitution (1957).

[3] Sigmund Freud wrote in 1935:

"Homosexuality is assuredly no advantage, but it is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness; we consider it to be a variation of the sexual function produced by a certain arrest of sexual development. Many highly respectable individuals of ancient and modern times have been homosexuals, several of the greatest men among them (Plato, Michelangelo, Leonardo da Vinci, etc.). It is a great injustice to persecute homosexuality as a crime, and cruelty too. If you do not believe me, read the books of Havelock Ellis." Ruitenbeek, The Problem of Homosexuality in Modern Society 1 (1963).

If we are to hold, as the Court apparently does, that any acts of homosexuality suffice to deport the alien, whether or not they are part of a fabric of antisocial behavior, then we face a serious question of due process. By that construction a person is judged by a standard that is almost incapable of definition. I have already quoted from clinical experts to show what a wide range the term "psychopathic personality" has. Another expert [4] classifies such a person under three headings:

Acting: (1) inability to withstand tedium, (2) lack of a sense of responsibility, (3) a tendency to "blow up" under pressure, (4) maladjustment to law and order, and (5) recidivism.

Feeling: they tend to (1) be emotionally deficient, narcissistic, callous, inconsiderate, and unremorseful, generally projecting blame on others, (2) have hair-trigger emotions, exaggerated display of emotion, and be irritable and impulsive, (3) be amoral (socially and sexually) and (4) worry, but do nothing about it.

Thinking: they display (1) defective judgment, living for the present rather than for the future, and (2) inability to profit from experience, *i. e.*, they are able to realize the consequences intelligently, but not to evaluate them.

We held in *Jordan* v. *De George*, 341 U. S. 223, that the crime of a conspiracy to defraud the United States of taxes involved "moral turpitude" and made the person subject to deportation. That, however, was a term that has "deep roots in the law." *Id.*, at 227. But the grab-bag—"psychopathic personality"—has no "deep roots" whatsoever.[5] Caprice of judgment is almost certain under this broad definition. Anyone can be caught who is unpopular, who is off-beat, who is nonconformist.

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[4] Caldwell, Constitutional Psychopathic State (Psychopathic Personality) Studies of Soldiers in the U. S. Army, 3 J. Crim. Psychopathology 171–172 (1941).

[5] See Lindman & McIntyre, The Mentally Disabled and the Law 299 (1961).

Deportation is the equivalent to banishment or exile. *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10. Though technically not criminal, it practically may be. The penalty is so severe that we have extended to the resident alien the protection of due process. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33. Even apart from deportation cases, we look with suspicion at those delegations of power so broad as to allow the administrative staff the power to formulate the fundamental policy. See *Watkins* v. *United States*, 354 U. S. 178, 203–205; *Kent* v. *Dulles*, 357 U. S. 116. In the *Watkins* case we were protecting important First Amendment rights. In the *Kent* case we were protecting the right to travel, an important ingredient of a person's "liberty" within the meaning of the Fifth Amendment. We deal here also with an aspect of "liberty" and the requirements of due process. They demand that the standard be sufficiently clear as to forewarn those who may otherwise be entrapped and to provide full opportunity to conform. "Psychopathic personality" is so broad and vague as to be hardly more than an epithet. The Court seeks to avoid this question by saying that the standard being applied relates only to what petitioner had done prior to his entry, not to his postentry conduct. *But at least half of the questioning of this petitioner related to his postentry conduct.*

Moreover, the issue of deportability under § 212 (a) of the Immigration and Nationality Act of 1952 turns on whether petitioner is "afflicted with psychopathic personality." On this I think he is entitled to a hearing to satisfy both the statute and the requirement of due process.

One psychiatrist reported:

> "On psychiatric examination of Mr. Boutilier, there was no indication of delusional trend or hallucinatory phenomena. He is not psychotic. From his own account, he has a psychosexual problem

but is beginning treatment for this disorder. Diagnostically, I would consider him as having a Character Neurosis, believe that the prognosis in therapy is reasonably good and do not think he represents any risk of decompensation into a dependent psychotic reaction nor any potential for frank criminal activity."

Another submitted a long report ending as follows:

"The patient's present difficulties obviously weigh very heavily upon him. He feels as if he has made his life in this country and is deeply disturbed at the prospect of being cut off from the life he has created for himself. He talks frankly about himself. What emerged out of the interview was not a picture of a psychopath but that of a dependent, immature young man with a conscience, an awareness of the feelings of others and a sense of personal honesty. His sexual structure still appears fluid and immature so that he moves from homosexual to heterosexual interests as well as abstinence with almost equal facility. His homosexual orientation seems secondary to a very constricted, dependent personality pattern rather than occurring in the context of a psychopathic personality. My own feeling is that his own need to fit in and be accepted is so great that it far surpasses his need for sex in any form.

"I do not believe that Mr. Boutilier is a psychopath."

In light of these statements, I cannot say that it has been determined that petitioner was "afflicted" in the statutory sense either at the time of entry or at present. "Afflicted" means possessed or dominated by. Occasional acts would not seem sufficient. "Afflicted" means a way of life, an accustomed pattern of conduct. Whatever disagreement there is as to the meaning of "psycho-

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pathic personality," it has generally been understood to refer to a consistent, lifelong pattern of behavior conflicting with social norms without accompanying guilt. Cleckley, *supra*, at 29.[6] Nothing of that character was

[6] There is good indication that Congress intended the term "afflicted with psychopathic personality" to refer only to those individuals demonstrating "developmental defects or pathological trends in the personality structure manifest[ed] by lifelong patterns of action or behavior . . . ." U. S. Public Health Service, Report on Medical Aspects of H. R. 2379, U. S. Code Cong. & Admin. News 1700 (1952). The provision for exclusion of persons afflicted with psychopathic personality replaced the section of the 1917 Act, 39 Stat. 875, providing for the exclusion of "persons of constitutional psychopathic inferiority." The purpose of that clause was "to keep out 'tainted blood,' that is, 'persons who have medical traits which would harm the people of the United States if those traits were introduced in this country, or if those possessing those traits were added to those in this country who unfortunately are so afflicted.'" The Immigration and Naturalization Systems of the United States, S. Rep. No. 1515, 81st Cong., 2d Sess., 343 (1950). The Senate subcommittee which had been charged with making an investigation of the immigration laws concluded that "the exclusion of persons with 'constitutional psychopathic inferiority' was aimed at keeping out of the country aliens with a propensity to mental aberration, those with an inherent likelihood of becoming mental cases, as indicated by their case history." *Ibid.* It concluded that "the purpose of the provision against 'persons with constitutional psychopathic inferiority' will be more adequately served by changing that term to 'persons afflicted with psychopathic personality,' and that the classes of mentally defectives should be enlarged to include homosexuals and other sex perverts." *Id.*, at 345. Senate Report 1515 accompanied Senate bill 3455, which included among excludable aliens "[a]liens afflicted with psychopathic personality," and "[a]liens who are homosexuals or sex perverts." The bill was redrafted and became S. 716, with its counterpart in the House being H. R. 2379; the material provisions remained the same as in S. 3455. In response to the House's request for its opinion on the new provisions, the Public Health Service noted that:

"The conditions classified within the group of psychopathic personalities are, in effect, disorders of the personality. They are characterized by developmental defects or pathological trends in the personality structure manifest by lifelong patterns of action or

shown to exist at the time of entry. The fact that he presently has a problem, as one psychiatrist said, does not mean that he is or was necessarily "afflicted" with homosexuality. His conduct is, of course, evidence material to the issue. But the informed judgment of experts is needed to make the required finding. We cruelly mutilate the Act when we hold otherwise. For we make the word of the bureaucrat supreme, when it was the expertise of the doctors and psychiatrists on which Congress wanted the administrative action to be dependent.

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behavior, rather than by mental or emotional symptoms. Individuals with such a disorder may manifest a disturbance of intrinsic personality patterns, exaggerated personality trends, or are persons ill primarily in terms of society and the prevailing culture. The latter or sociopathic reactions are frequently symptomatic of a severe underlying neurosis or psychosis and frequently include those groups of individuals suffering from addiction or sexual deviation." U. S. Code Cong. & Admin. News 1700 (1952).

The letter setting forth the views of the Public Health Service went on to say, with respect to the exclusion of "homosexuals or sex perverts":

"Ordinarily, persons suffering from disturbances in sexuality are included within the classification of 'psychopathic personality with pathologic sexuality.' This classification will specify such types of pathologic behavior as homosexuality or sexual perversion which includes sexual sadism, fetishism, transvestism, pedophilia, etc." *Id.*, at 1701. The bill which was finally enacted, H. R. 5678, provided for exclusion of "[a]liens afflicted with psychopathic personality," but did not provide for exclusion of aliens who are homosexuals or sex perverts, as had its predecessors. The House Report, H. R. Rep. No. 1365, which accompanied the bill incorporated the full report of the Public Health Service (H. R. Rep. No. 1365, 82d Cong., 2d Sess., at 46–48) and indicated that the "recommendations contained in the . . . report have been followed." *Id.*, at 48.

This legislative history indicates that the term "afflicted with psychopathic personality" was used in a medical sense and was meant to refer to lifelong patterns of action that are pathologic and symptomatic of grave underlying neurosis or psychosis. Homosexuality and sex perversion, as a subclass, are limited to the same afflictions.

ABBOTT LABORATORIES ET AL. *v.* GARDNER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 39. Argued January 16, 1967.—Decided May 22, 1967.

The Commissioner of Food and Drugs, exercising authority delegated to him by the Secretary of Health, Education, and Welfare, issued regulations requiring that labels and advertisements for prescription drugs which bear proprietary names for the drugs or the ingredients carry the corresponding "established name" (designated by the Secretary) every time the proprietary or trade name is used. These regulations were designed to implement the 1962 amendment to § 502 (e) (1) (B) of the Federal Food, Drug, and Cosmetic Act. Petitioners, drug manufacturers and a manufacturers' association, challenged the regulations on the ground that the Commissioner exceeded his authority under the statute. The District Court granted the declaratory and injunctive relief sought, finding that the scope of the statute was not as broad as that of the regulations. The Court of Appeals reversed without reaching the merits, holding that pre-enforcement review of the regulations was unauthorized and beyond the jurisdiction of the District Court, and that no "actual case or controversy" existed. *Held:*

1. Pre-enforcement review of these regulations is not prohibited by the Federal Food, Drug, and Cosmetic Act. Pp. 139–148.

(a) The courts should restrict access to judicial review only upon a showing of "clear and convincing evidence" of a contrary legislative intent. *Rusk* v. *Cort*, 369 U. S. 367, 379–380. Pp. 139–141.

(b) The statutory scheme in the food and drug area does not exclude pre-enforcement judicial review. Pp. 141–144.

(c) The special-review provisions of § 701 (f) of the Act, applying to regulations embodying technical factual determinations, were simply intended to assure adequate judicial review of such agency decisions and manifest no congressional purpose to eliminate review of other kinds of agency action. P. 144.

(d) The saving clause of § 701 (f)(6) which states that the "remedies provided for in this subsection shall be in addition to and not in substitution for any other remedies provided by law," does not foreclose pre-enforcement judicial review and should be read in harmony with the policy favoring judicial review expressed in the Administrative Procedure Act and court decisions. Pp. 144–146.

(e) *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U. S. 594, which did not concern the promulgation of a self-operative industry-wide regulation, distinguished. Pp. 146–148.

2. This case presents a controversy "ripe" for judicial resolution. Pp. 148–156.

(a) The issue of statutory construction is purely legal, and the regulations are "final agency action" within § 10 of the Administrative Procedure Act. *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, and similar cases followed. Pp. 149–152.

(b) The impact of the regulations upon petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage. Pp. 152–154.

(c) Here the pre-enforcement challenge by nearly all prescription drug manufacturers is not calculated to delay or impede effective enforcement of the Federal Food, Drug, and Cosmetic Act. Pp. 154–155.

352 F. 2d 286, reversed and remanded.

Gerhard A. Gesell argued the cause and filed briefs for petitioners.

Nathan Lewin argued the cause for respondents. With him on the brief were *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg, Jerome M. Feit* and *William W. Goodrich.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

In 1962 Congress amended the Federal Food, Drug, and Cosmetic Act (52 Stat. 1040, as amended by the Drug Amendments of 1962, 76 Stat. 780, 21 U. S. C. § 301 *et seq.*), to require manufacturers of prescription drugs to print the "established name" of the drug "prominently

and in type at least half as large as that used thereon for any proprietary name or designation for such drug," on labels and other printed material, § 502 (e)(1)(B), 21 U. S. C. § 352(e)(1)(B). The "established name" is one designated by the Secretary of Health, Education, and Welfare pursuant to § 502(e)(2) of the Act, 21 U. S. C. § 352 (e)(2); the "proprietary name" is usually a trade name under which a particular drug is marketed. The underlying purpose of the 1962 amendment was to bring to the attention of doctors and patients the fact that many of the drugs sold under familiar trade names are actually identical to drugs sold under their "established" or less familiar trade names at significantly lower prices. The Commissioner of Food and Drugs, exercising authority delegated to him by the Secretary, 22 Fed. Reg. 1051, 25 Fed. Reg. 8625, published proposed regulations designed to implement the statute, 28 Fed. Reg. 1448. After inviting and considering comments submitted by interested parties the Commissioner promulgated the following regulation for the "efficient enforcement" of the Act, § 701 (a), 21 U. S. C. § 371 (a):

> "If the label or labeling of a prescription drug bears a proprietary name or designation for the drug or any ingredient thereof, the established name, if such there be, corresponding to such proprietary name or designation, shall accompany each appearance of such proprietary name or designation." 21 CFR § 1.104 (g)(1).

A similar rule was made applicable to advertisements for prescription drugs, 21 CFR § 1.105 (b)(1).

The present action was brought by a group of 37 individual drug manufacturers and by the Pharmaceutical Manufacturers Association, of which all the petitioner companies are members, and which includes manufacturers of more than 90% of the Nation's supply of pre-

scription drugs. They challenged the regulations on the ground that the Commissioner exceeded his authority under the statute by promulgating an order requiring labels, advertisements, and other printed matter relating to prescription drugs to designate the established name of the particular drug involved every time its trade name is used anywhere in such material.

The District Court, on cross motions for summary judgment, granted the declaratory and injunctive relief sought, finding that the statute did not sweep so broadly as to permit the Commissioner's "every time" interpretation. 228 F. Supp. 855. The Court of Appeals for the Third Circuit reversed without reaching the merits of the case. 352 F. 2d 286. It held first that under the statutory scheme provided by the Federal Food, Drug, and Cosmetic Act pre-enforcement [1] review of these regulations was unauthorized and therefore beyond the jurisdiction of the District Court. Second, the Court of Appeals held that no "actual case or controversy" existed and, for that reason, that no relief under the Administrative Procedure Act, 5 U. S. C. §§ 701–704 (1964 ed., Supp. II), or under the Declaratory Judgment Act, 28 U. S. C. § 2201, was in any event available. Because of the general importance of the question, and the apparent conflict with the decision of the Court of Appeals for the Second Circuit in *Toilet Goods Assn.* v. *Gardner*, 360 F. 2d 677, which we also review today, *post*, p. 158, we granted certiorari. 383 U. S. 924.

I.

The first question we consider is whether Congress by the Federal Food, Drug, and Cosmetic Act intended to forbid pre-enforcement review of this sort of regulation

[1] That is, a suit brought by one before any attempted enforcement of the statute or regulation against him.

promulgated by the Commissioner. The question is phrased in terms of "prohibition" rather than "authorization" because a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress. *Board of Governors* v. *Agnew*, 329 U. S. 441; *Heikkila* v. *Barber*, 345 U. S. 229; *Brownell* v. *Tom We Shung*, 352 U. S. 180; *Harmon* v. *Brucker*, 355 U. S. 579; *Leedom* v. *Kyne*, 358 U. S. 184; *Rusk* v. *Cort*, 369 U. S. 367. Early cases in which this type of judicial review was entertained, *e. g.*, *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177; *Stark* v. *Wickard*, 321 U. S. 288, have been reinforced by the enactment of the Administrative Procedure Act, which embodies the basic presumption of judicial review to one "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U. S. C. § 702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 U. S. C. § 701 (a). The Administrative Procedure Act provides specifically not only for review of "[a]gency action made reviewable by statute" but also for review of "final agency action for which there is no other adequate remedy in a court," 5 U. S. C. § 704. The legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions,[2] and this Court has echoed that theme by noting that the Ad-

[2] See H. R. Rep. No. 1980, 79th Cong., 2d Sess., 41 (1946): "To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review." See also S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945).

ministrative Procedure Act's "generous review provisions" must be given a "hospitable" interpretation. *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, 51; see *United States* v. *Interstate Commerce Comm'n*, 337 U. S. 426, 433–435; *Brownell* v. *Tom We Shung*, *supra*; *Heikkila* v. *Barber*, *supra*. Again in *Rusk* v. *Cort*, *supra*, at 379–380, the Court held that only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review. See also Jaffe, Judicial Control of Administrative Action 336–359 (1965).

Given this standard, we are wholly unpersuaded that the statutory scheme in the food and drug area excludes this type of action. The Government relies on no explicit statutory authority for its argument that pre-enforcement review is unavailable, but insists instead that because the statute includes a specific procedure for such review of certain enumerated kinds of regulations,[3] not encompassing those of the kind involved here, other types were necessarily meant to be excluded from any pre-enforcement review. The issue, however, is not so readily resolved; we must go further and inquire whether in the context of the entire legislative scheme the existence of that circumscribed remedy evinces a congressional purpose to bar agency action not within its purview from judicial review. As a leading authority in this field has noted, "The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent." Jaffe, *supra*, at 357.

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[3] Embodied in §§ 701 (e), (f), 21 U. S. C. §§ 371 (e), (f), and discussed hereafter. Section 701 (e) provides a procedure for the issuance of regulations under certain specifically enumerated statutory sections. Section 701 (f) establishes a procedure for direct review by a court of appeals of a regulation promulgated under § 701 (e).

In this case the Government has not demonstrated such a purpose; indeed, a study of the legislative history shows rather conclusively that the specific review provisions were designed to give an additional remedy and not to cut down more traditional channels of review. At the time the Food, Drug, and Cosmetic Act was under consideration, in the late 1930's, the Administrative Procedure Act had not yet been enacted,[4] the Declaratory Judgment Act was in its infancy,[5] and the scope of judicial review of administrative decisions under the equity power was unclear.[6] It was these factors that led to the form the statute ultimately took. There is no evidence at all that members of Congress meant to preclude traditional avenues of judicial relief. Indeed, throughout the consideration of the various bills submitted to deal with this issue, it was recognized that "There is always an appropriate remedy in equity in cases where an administrative officer has exceeded his authority and there is no adequate remedy of law, . . . [and that] protection is given by the so-called Declaratory Judgments Act . . . ." H. R. Rep. No. 2755, 74th Cong., 2d Sess., 8. It was specifically brought to the attention of Congress that such methods had in fact been used in the food and drug area,[7] and the Department of Justice, in opposing the enactment of the special-review procedures of § 701, submitted a memorandum which was read on the floor of the House

[4] The Administrative Procedure Act was enacted in 1946, 60 Stat. 237.

[5] The Declaratory Judgment Act was enacted in 1934, 48 Stat. 955.

[6] See, *e. g.*, the discussion of judicial review under the equity power in the House of Representatives during the debate on these provisions. 83 Cong. Rec. 7891–7896 (1938).

[7] See, *e. g.*, 83 Cong. Rec. 7783 (remarks of Representative Leavy) (1938); Statement of Professor David F. Cavers before a Subcommittee of the Senate Committee on Commerce on S. 1944, 73d Cong., 2d Sess. (1933), reprinted in Dunn, Federal Food, Drug, and Cosmetic Act, A Statement of Its Legislative Record 1110 (1938).

stating: "As a matter of fact, the entire subsection is really unnecessary, because even without any express provision in the bill for court review, any citizen aggrieved by any order of the Secretary, who contends that the order is invalid, may test the legality of the order by bringing an injunction suit against the Secretary, or the head of the Bureau, under the general equity powers of the court." 83 Cong. Rec. 7892 (1938).

The main issue in contention was whether these methods of review were satisfactory. Compare the majority and minority reports on the review provisions, H. R. Rep. No. 2139, 75th Cong., 3d Sess. (1938), both of which acknowledged that traditional judicial remedies were available, but disagreed as to the need for additional procedures. The provisions now embodied in a modified form in § 701 (f) were supported by those who feared the life-and-death power given by the Act to the executive officials, a fear voiced by many members of Congress. The supporters of the special-review section sought to include it in the Act primarily as a method of reviewing agency *factual* determinations. For example, it was argued that the level of tolerance for poisonous sprays on apple crops, which the Secretary of Agriculture had recently set, was a factual matter, not reviewable in equity in the absence of a special statutory review procedure.[8] Some congressmen urged that challenge to this type of determination should be in the form of a *de novo* hearing in a district court, but the Act as it was finally passed compromised the matter by allowing an appeal on a record with a "substantial evidence" test, affording a considerably more generous judicial review than the "arbitrary and capricious" test available in the traditional injunctive suit.[9]

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[8] See, *e. g.*, 83 Cong. Rec. 7772–7773, 7781–7784, 7893–7899 (1938).

[9] See, *e. g.*, the discussion of the conference report, 83 Cong. Rec. 9096–9098 (1938).

A second reason for the special procedure was to provide broader venue to litigants challenging such technical agency determinations. At that time, a suit against the Secretary was proper only in the District of Columbia, an advantage that the Government sought to preserve. The House bill, however, originally authorized review in any district court, but in the face of a Senate bill allowing review only in the District of Columbia, the Conference Committee reached the compromise preserved in the present statute authorizing review of such agency actions by the courts of appeals.[10]

Against this background we think it quite apparent that the special-review procedures provided in § 701 (f), applying to regulations embodying technical factual determinations,[11] were simply intended to assure adequate judicial review of such agency decisions, and that their enactment does not manifest a congressional purpose to eliminate judicial review of other kinds of agency action.

This conclusion is strongly buttressed by the fact that the Act itself, in § 701 (f)(6), states, "The remedies provided for in this subsection shall be in addition to and not in substitution for any other remedies provided by law." This saving clause was passed over by the Court of Appeals without discussion. In our view, however, it bears heavily on the issue, for if taken at face value it would foreclose the Government's main argument in this case. The Government deals with the clause by arguing that it should be read as applying only to review of

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[10] See, *e. g.*, 83 Cong. Rec. 7772, 7892, 9092–9093 (1938).

[11] See *Toilet Goods Assn.* v. *Gardner*, 360 F. 2d 677, 683, where the court noted that "The agency determinations specifically reviewable under § 701 (e) relate to such technical subjects as chemical properties of particular products and the formulation and application of safety standards for protecting public health; Congress naturally did not wish courts to consider such matters without the benefit of the agency's views after an evidentiary hearing before it."

regulations under the sections specifically enumerated in § 701 (e). This is a conceivable reading, but it requires a considerable straining both of language and of common understanding. The saving clause itself contains no limitations, and it requires an artificial statutory construction to read a general grant of a right to judicial review begrudgingly, so as to cut out agency actions that a literal reading would cover.

There is no support in the legislative background for such a reading of the clause. It was included in the House bill, whose report states that the provision ". . . saved as a method to review a regulation placed in effect by the Secretary whatever rights exist to initiate a historical proceeding in equity to enjoin the enforcement of the regulation, and whatever rights exist to initiate a declaratory judgment proceeding." H. R. Rep. No. 2139, 75th Cong., 3d Sess., 11. The Senate conferees accepted the provision.[12] The Government argues that the clause is included as a part of § 701 (f), and therefore should be read to apply only to those sections to which the § 701 (f) special-review procedure applies. But it is difficult to think of a more appropriate place to put a general saving clause than where Congress placed it—at the conclusion of the section setting out a special procedure for use in certain specified instances. Furthermore, the Government's reading would result in an anomaly. The §§ 701 (e)–(f) procedure was included in the Act in order to deal with the problem of technical determinations for which the normal equity power was deemed insufficient. See, *supra*, pp. 142–144. There would seem little reason for Congress to have enacted § 701 (f), and at the same time to have included a clause aimed only at preserving for such determinations the

[12] H. R. Conf. Rep. No. 2716, 75th Cong., 3d Sess., 25 (1938); 83 Cong. Rec. 8731–8738 (1938) (Senate agreement to the conference report).

other types of review whose supposed inadequacy was the very reason for the special-review provisions.

Under the Government's view, indeed, it is difficult to ascertain when the saving clause would even come into play: when the special provisions apply, presumably they must be used and a court would not grant injunctive or declaratory judgment relief unless the appropriate administrative procedure is exhausted.[13] When the special procedure does not apply, the Government deems the saving clause likewise inapplicable. The Government, to be sure, does present a rather far-fetched example of what it considers a possible application of the relief saved by § 701 (f)(6), but merely to state it reveals the weakness of the Government's position.[14] We prefer to take the saving clause at its face value, and to read it in harmony with the policy favoring judicial review expressed in the Administrative Procedure Act and this Court's decisions.

The only other argument of the Government requiring attention on the preclusive effect of the statute is that *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U. S. 594, counsels a restrictive view of judicial review in the food and drug area. In that case the Food and Drug Administrator found that there was probable cause that a drug was "adulterated" because it was misbranded in such a way as to be "fraudulent" or "misleading to

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[13] See Notes of the Advisory Committee on Federal Rule of Civil Procedure 57, reprinted in 28 U. S. C. App., at 6136: "A declaration may not be rendered if a special statutory proceeding has been provided for the adjudication of some special type of case . . . ." See also 6A Moore, Federal Practice § 57.08[3] (2d ed. 1966).

[14] The Government apparently views the clause as applying only when regulations falling within the special-review procedure are promulgated without affording the required public notice and opportunity to file objections and to request a public hearing. In such a case alone, the Government asserts, "an equity proceeding or a declaratory judgment action . . . might be entertained on the ground that the statutory procedures had not been followed." Brief, p. 28.

the injury or damage of the purchaser or consumer." § 304 (a), 21 U. S. C. § 334 (a). Multiple seizures were ordered through libel actions. The manufacturer of the drug brought an action to challenge directly the Administrator's finding of probable cause. This Court held that the owner could raise his constitutional, statutory, and factual claims in the libel actions themselves, and that the mere finding of probable cause by the Administrator could not be challenged in a separate action. That decision was quite clearly correct, but nothing in its reasoning or holding has any bearing on this declaratory judgment action challenging a promulgated regulation.

The Court in *Ewing* first noted that the "administrative finding of probable cause required by § 304 (a) is merely the statutory prerequisite to the bringing of the lawsuit," at which the issues are aired. 339 U. S., at 598. Such a situation bears no analogy to the promulgation, after formal procedures, of a rule that must be followed by an entire industry. To equate a finding of probable cause for proceeding against a particular drug manufacturer with the promulgation of a self-operative industry-wide regulation, such as we have here, would immunize nearly all agency rulemaking activities from the coverage of the Administrative Procedure Act.

Second, the determination of probable cause in *Ewing* has "no effect in and of itself," 339 U. S., at 598; only some action consequent upon such a finding could give it legal life. As the Court there noted, like a determination by a grand jury that there is probable cause to proceed against an accused, it is a finding which only has vitality once a proceeding is commenced, at which time appropriate challenges can be made. The Court also noted that the unique type of relief sought by the drug manufacturer was inconsistent with the policy of the Act favoring speedy action against goods in circulation that are believed on probable cause to be adul-

terated. Also, such relief was not specifically granted by the Act, which did provide another type of relief in the form of a consolidation of multiple libel actions in a convenient venue. 339 U. S., at 602.

The drug manufacturer in *Ewing* was quite obviously seeking an unheard-of form of relief which, if allowed, would have permitted interference in the early stages of an administrative determination as to specific facts, and would have prevented the regular operation of the seizure procedures established by the Act. That the Court refused to permit such an action is hardly authority for cutting off the well-established jurisdiction of the federal courts to hear, in appropriate cases, suits under the Declaratory Judgment Act and the Administrative Procedure Act challenging final agency action of the kind present here.

We conclude that nothing in the Food, Drug, and Cosmetic Act itself precludes this action.

II.

A further inquiry must, however, be made. The injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy "ripe" for judicial resolution. Without undertaking to survey the intricacies of the ripeness doctrine [15] it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging

[15] See 3 Davis, Administrative Law Treatise, c. 21 (1958); Jaffe, Judicial Control of Administrative Action, c. 10 (1965).

parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

As to the former factor, we believe the issues presented are appropriate for judicial resolution at this time. First, all parties agree that the issue tendered is a purely legal one: whether the statute was properly construed by the Commissioner to require the established name of the drug to be used *every time* the proprietary name is employed.[16] Both sides moved for summary judgment in the District Court, and no claim is made here that further administrative proceedings are contemplated. It is suggested that the justification for this rule might vary with different circumstances, and that the expertise of the Commissioner is relevant to passing upon the validity of the regulation. This of course is true, but the suggestion overlooks the fact that both sides have approached this case as one purely of congressional intent, and that the Government made no effort to justify the regulation in factual terms.

Second, the regulations in issue we find to be "final agency action" within the meaning of § 10 of the Administrative Procedure Act, 5 U. S. C. § 704, as construed in judicial decisions. An "agency action" includes any "rule," defined by the Act as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy," §§ 2 (c), 2 (g), 5 U. S. C. §§ 551 (4), 551 (13). The cases dealing with judicial review of administrative actions have interpreted the "finality" element in a pragmatic way. Thus in *Columbia Broadcasting System*

[16] While the "every time" issue has been framed by the parties in terms of statutory *compulsion*, we think that its essentially legal character would not be different had it been framed in terms of statutory *authorization* for the requirement.

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v. *United States*, 316 U. S. 407, a suit under the Urgent Deficiencies Act, 38 Stat. 219, this Court held reviewable a regulation of the Federal Communications Commission setting forth certain proscribed contractual arrangements between chain broadcasters and local stations. The FCC did not have direct authority to regulate these contracts, and its rule asserted only that it would not license stations which maintained such contracts with the networks. Although no license had in fact been denied or revoked, and the FCC regulation could properly be characterized as a statement only of its intentions, the Court held that "Such regulations have the force of law before their sanctions are invoked as well as after. When, as here, they are promulgated by order of the Commission and the expected conformity to them causes injury cognizable by a court of equity, they are appropriately the subject of attack . . . ." 316 U. S., at 418–419.

Two more recent cases have taken a similarly flexible view of finality. In *Frozen Food Express* v. *United States*, 351 U. S. 40, at issue was an Interstate Commerce Commission order specifying commodities that were deemed to fall within the statutory class of "agricultural commodities." Vehicles carrying such commodities were exempt from ICC supervision. An action was brought by a carrier that claimed to be transporting exempt commodities, but which the ICC order had not included in its terms. Although the dissenting opinion noted that this ICC order had no authority except to give notice of how the Commission interpreted the Act and would have effect only if and when a particular action was brought against a particular carrier, and argued that "judicial intervention [should] be withheld until administrative action has reached its complete development," 351 U. S., at 45, the Court held the order reviewable.

Again, in *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192, the Court held to be a final agency action within the meaning of the Administrative Procedure Act an FCC regulation announcing a Commission policy that it would not issue a television license to an applicant already owning five such licenses, even though no specific application was before the Commission. The Court stated: "The process of rulemaking was complete. It was final agency action . . . by which Storer claimed to be 'aggrieved.'" 351 U. S., at 198.

We find decision in the present case following *a fortiori* from these precedents. The regulation challenged here, promulgated in a formal manner after announcement in the Federal Register and consideration of comments by interested parties [17] is quite clearly definitive. There is no hint that this regulation is informal, see *Helco Products Co.* v. *McNutt*, 78 U. S. App. D. C. 71, 137 F. 2d 681, or only the ruling of a subordinate official, see *Swift & Co.* v. *Wickham*, 230 F. Supp. 398, 409, aff'd, 364 F. 2d 241, or tentative. It was made effective upon publication, and the Assistant General Counsel for Food and Drugs stated in the District Court that compliance was expected.

The Government argues, however, that the present case can be distinguished from cases like *Frozen Food Express* on the ground that in those instances the agency involved could implement its policy directly, while here the Attorney General must authorize criminal and seizure actions for violations of the statute. In the context of this case, we do not find this argument persuasive. These regulations are not meant to advise the Attorney General, but purport to be directly authorized by the statute. Thus, if within the Commissioner's authority,

[17] Compare similar procedures followed in *Frozen Food Express*, *supra*, at 41–42, and *Storer*, *supra*, at 193–194. The procedure conformed with that prescribed in § 4 of the Administrative Procedure Act, 5 U. S. C. § 1003.

they have the status of law and violations of them carry heavy criminal and civil sanctions. Also, there is no representation that the Attorney General and the Commissioner disagree in this area; the Justice Department is defending this very suit. It would be adherence to a mere technicality to give any credence to this contention. Moreover, the agency does have direct authority to enforce this regulation in the context of passing upon applications for clearance of new drugs, § 505, 21 U. S. C. § 355, or certification of certain antibiotics, § 507, 21 U. S. C. § 357.

This is also a case in which the impact of the regulations upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage. These regulations purport to give an authoritative interpretation of a statutory provision that has a direct effect on the day-to-day business of all prescription drug companies; its promulgation puts petitioners in a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate.[18] As the District Court found on the basis of uncontested allegations, "Either they must comply with the every time requirement and incur the costs of changing over their promotional material and labeling or they must follow their present course and risk prosecution." 228 F. Supp. 855, 861. The regulations are clear-cut, and were made effective immediately upon publication; as noted earlier the agency's counsel represented to the District Court that immediate compliance with their terms was expected. If petitioners wish to comply they must change all their labels, advertisements, and promotional materials; they must destroy stocks of printed matter; and they must invest heavily in new printing type and new supplies.

[18] See S. Rep. No. 1005, 73d Cong., 2d Sess., 2–3 (1934); Borchard, Challenging "Penal" Statutes by Declaratory Action, 52 Yale L. J. 445, 454 (1943).

The alternative to compliance—continued use of material which they believe in good faith meets the statutory requirements, but which clearly does not meet the regulation of the Commissioner—may be even more costly. That course would risk serious criminal and civil penalties for the unlawful distribution of "misbranded" drugs.[19]

It is relevant at this juncture to recognize that petitioners deal in a sensitive industry, in which public confidence in their drug products is especially important. To require them to challenge these regulations only as a defense to an action brought by the Government might harm them severely and unnecessarily. Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstance, neither of which appears here.

The Government does not dispute the very real dilemma in which petitioners are placed by the regulation, but contends that "mere financial expense" is not a justification for pre-enforcement judicial review. It is of course true that cases in this Court dealing with the standing of particular parties to bring an action have held that a possible financial loss is not by itself a sufficient interest to sustain a judicial challenge to governmental action. *Frothingham* v. *Mellon,* 262 U. S. 447; *Perkins* v. *Lukens*

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[19] Section 502 (e)(1)(B) declares a drug not complying with this labeling requirement to be "misbranded." Section 301, 21 U. S. C. § 331, designates as "prohibited acts" the misbranding of drugs in interstate commerce. Such prohibited acts are subject to injunction, § 302, 21 U. S. C. § 332, criminal penalties, § 303, 21 U. S. C. § 333, and seizure, § 304 (a), 21 U. S. C. § 334 (a).

Steel Co., 310 U. S. 113. But there is no question in the present case that petitioners have sufficient standing as plaintiffs: the regulation is directed at them in particular; it requires them to make significant changes in their everyday business practices; if they fail to observe the Commissioner's rule they are quite clearly exposed to the imposition of strong sanctions. Compare *Columbia Broadcasting System* v. *United States*, 316 U. S. 407; 3 Davis, Administrative Law Treatise, c. 21 (1958). This case is, therefore, remote from the *Mellon* and *Perkins* cases.

The Government further contends that the threat of criminal sanctions for noncompliance with a judicially untested regulation is unrealistic; the Solicitor General has represented that if court enforcement becomes necessary, "the Department of Justice will proceed only civilly for an injunction . . . or by condemnation." We cannot accept this argument as a sufficient answer to petitioners' petition. This action at its inception was properly brought and this subsequent representation of the Department of Justice should not suffice to defeat it.

Finally, the Government urges that to permit resort to the courts in this type of case may delay or impede effective enforcement of the Act. We fully recognize the important public interest served by assuring prompt and unimpeded administration of the Pure Food, Drug, and Cosmetic Act, but we do not find the Government's argument convincing. First, in this particular case, a pre-enforcement challenge by nearly all prescription drug manufacturers is calculated to speed enforcement. If the Government prevails, a large part of the industry is bound by the decree; if the Government loses, it can more quickly revise its regulation.

The Government contends, however, that if the Court allows this consolidated suit, then nothing will prevent a multiplicity of suits in various jurisdictions challenging other regulations. The short answer to this contention

is that the courts are well equipped to deal with such eventualities. The venue transfer provision, 28 U. S. C. § 1404 (a), may be invoked by the Government to consolidate separate actions. Or, actions in all but one jurisdiction might be stayed pending the conclusion of one proceeding. See *American Life Ins. Co.* v. *Stewart*, 300 U. S. 203, 215–216. A court may even in its discretion dismiss a declaratory judgment or injunctive suit if the same issue is pending in litigation elsewhere. *Maryland Cas. Co.* v. *Consumers Finance Service*, 101 F. 2d 514; *Carbide & Carbon C. Corp.* v. *United States I. Chemicals*, 140 F. 2d 47; Note, Availability of a Declaratory Judgment When Another Suit Is Pending, 51 Yale L. J. 511 (1942). In at least one suit for a declaratory judgment, relief was denied with the suggestion that the plaintiff intervene in a pending action elsewhere. *Automotive Equip., Inc.* v. *Trico Prods. Corp.*, 11 F. Supp. 292; See *Allstate Ins. Co.* v. *Thompson*, 121 F. Supp. 696.

Further, the declaratory judgment and injunctive remedies are equitable in nature, and other equitable defenses may be interposed. If a multiplicity of suits are undertaken in order to harass the Government or to delay enforcement, relief can be denied on this ground alone. *Truly* v. *Wanzer*, 5 How. 141, 142; cf. *Brillhart* v. *Excess Ins. Co.*, 316 U. S. 491, 495. The defense of laches could be asserted if the Government is prejudiced by a delay, *Southern Pac. Co.* v. *Bogert*, 250 U. S. 483, 488–490; 2 Pomeroy's Equity Jurisprudence §§ 419c–d (5th ed. Symons, 1941). And courts may even refuse declaratory relief for the nonjoinder of interested parties who are not, technically speaking, indispensable. Cf. *Samuel Goldwyn, Inc.* v. *United Artists Corp.*, 113 F. 2d 703; 6A Moore, Federal Practice ¶ 57.25 (2d ed. 1966).

In addition to all these safeguards against what the Government fears, it is important to note that the institution of this type of action does not by itself stay the effectiveness of the challenged regulation. There is

nothing in the record to indicate that petitioners have sought to stay enforcement of the "every time" regulation pending judicial review. See 5 U. S. C. § 705. If the agency believes that a suit of this type will significantly impede enforcement or will harm the public interest, it need not postpone enforcement of the regulation and may oppose any motion for a judicial stay on the part of those challenging the regulation. *Ibid.* It is scarcely to be doubted that a court would refuse to postpone the effective date of an agency action if the Government could show, as it made no effort to do here, that delay would be detrimental to the public health or safety. See *Associated Securities Corp.* v. *SEC*, 283 F. 2d 773, 775, where a stay was denied because "the petitioners . . . [had] not sustained the burden of establishing that the requested stays will not be harmful to the public interest . . ."; see *Eastern Air Lines* v. *CAB*, 261 F. 2d 830; cf. *Scripps-Howard Radio* v. *FCC*, 316 U. S. 4, 10–11; 5 U. S. C. § 705.

Lastly, although the Government presses us to reach the merits of the challenge to the regulation in the event we find the District Court properly entertained this action, we believe the better practice is to remand the case to the Court of Appeals for the Third Circuit to review the District Court's decision that the regulation was beyond the power of the Commissioner.[20]

Reversed and remanded.

MR. JUSTICE BRENNAN took no part in the consideration or decision of this case.

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[20] A totally separate issue raised in the petition for certiorari and argued by the parties in their briefs concerns the dismissal of the complaint as to certain of the plaintiffs on the ground that venue was improper as to them. All the petitioners asserted that venue was proper in Delaware not only because some of them are incorporated there but also under 28 U. S. C. § 1391 (e) (4), allowing an

[For dissenting opinions of MR. JUSTICE FORTAS and MR. JUSTICE CLARK, see *post*, pp. 174 and 201, respectively.]

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action against a government official in any judicial district in which "the plaintiff resides . . . ." It is contended that § 1391 (e)(4) must be read to incorporate the definition of "residence" set out in 28 U. S. C. § 1391 (c): "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes." The issue of construction is whether § 1391 (c) should be read as defining corporate venue only when the corporation is a defendant, or whether it should either (1) be adopted for corporate residence in all cases when a corporation is a plaintiff, or (2) at least as the definition of "resides" as used in § 1391 (e)(4).

This question is a difficult one, with far-reaching effects, and we think it is appropriate to dismiss our writ of certiorari as to this question for the following two reasons. First, the Court of Appeals in affirming the District Court on this issue did not explicitly endorse the lower court's ruling but held only: "We find no prejudicial error in the dismissal of the complaint as to these plaintiffs . . . ." 352 F. 2d 524, 525. Review of an issue of this importance is best left to a case where it has been fully dealt with by a court of appeals. Second, one of the plaintiffs whose complaint was not dismissed is the Pharmaceutical Manufacturers Association, of which all the corporate petitioners are members, and we think it should be considered that they are adequately protected in this suit by its participation, as well as by the participation of the remaining drug companies whose interests are identical to those of the petitioners whose complaints were dismissed. Cf. *Mishkin* v. *New York*, 383 U. S. 502, 512–514. Moreover, in the further course of this litigation it will be open to the dismissed plaintiffs to seek *amicus curiae* status.

TOILET GOODS ASSOCIATION, INC., ET AL. *v.* GARDNER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 336. Argued January 16, 1967.—Decided May 22, 1967.

Pursuant to the Color Additive Amendments of 1960 to the Federal Food, Drug, and Cosmetic Act, the Commissioner of Food and Drugs, by delegation from the Secretary of Health, Education, and Welfare, issued a regulation which provided that where a person has refused to permit Food and Drug employees free access to all manufacturing facilities and processes used in preparing color additives, the Commissioner "may immediately suspend certification service to such person and may continue such suspension until adequate corrective action has been taken." Petitioners, cosmetics distributors, manufacturers, and an association of cosmetics manufacturers, challenged this regulation and three others on the ground that the Commissioner exceeded his authority under the Act, and maintained that this regulation is impermissible since the Food and Drug Administration has long sought congressional authorization for free access to facilities, processes and formulae, which was denied except for prescription drugs. The District Court held that the Act did not prohibit this type of pre-enforcement action, that a case and controversy existed, that the issues were justiciable, and that the Government presented no reasons to warrant declining jurisdiction on discretionary grounds. In light of a later conflicting decision by the Court of Appeals for the Third Circuit in *Abbott Laboratories* v. *Celebrezze*, 352 F. 2d 286, the District Court reaffirmed its rulings but certified the question of jurisdiction to the Court of Appeals for the Second Circuit. The Court of Appeals sustained the Government's contention that judicial review was improper as to the regulation involved here, although it affirmed the District Court's judgment that it had jurisdiction as to the other challenged regulations. *Held:* Pre-enforcement judicial review of the regulation involved here is not appropriate as the controversy is not ripe for adjudication under the standards set forth in *Abbott Laboratories* v. *Gardner, ante*, p. 136. Pp. 160–166.

(a) The legal issue as presently framed is not appropriate for judicial resolution, as it is not known whether or when the Commissioner will order an inspection, what reasons he will give to justify his order, and whether the statutory scheme as a whole, notwithstanding Congress' refusal to include a specific statutory section authorizing such inspections, justified promulgation of the regulation. Pp. 162–164.

(b) The regulation will not affect the primary conduct of petitioners' business and since only minimal, if any, adverse consequences will face petitioners if they challenge the regulation upon enforcement, they should exhaust the administrative process before obtaining judicial review. Pp. 164–166.

360 F. 2d 677, affirmed.

Edward J. Ross argued the cause and filed a brief for petitioners.

Nathan Lewin argued the cause for respondents. With him on the briefs were *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg, Jerome M. Feit* and *William W. Goodrich.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

Petitioners in this case are the Toilet Goods Association, an organization of cosmetics manufacturers accounting for some 90% of annual American sales in this field, and 39 individual cosmetics manufacturers and distributors. They brought this action in the United States District Court for the Southern District of New York seeking declaratory and injunctive relief against the Secretary of Health, Education, and Welfare and the Commissioner of Food and Drugs, on the ground that certain regulations promulgated by the Commissioner exceeded his statutory authority under the Color Additive Amendments to the Federal Food, Drug, and Cosmetic Act, 74 Stat. 397, 21 U. S. C. §§ 321–376. The District Court held that the Act did not prohibit this type of pre-enforcement suit, that a case and controversy existed, that

the issues presented were justiciable, and that no reasons had been presented by the Government to warrant declining jurisdiction on discretionary grounds. 235 F. Supp. 648. Recognizing that the subsequent decision of the Court of Appeals for the Third Circuit in *Abbott Laboratories* v. *Celebrezze*, 352 F. 2d 286, appeared to conflict with its holding, the District Court reaffirmed its earlier rulings but certified the question of jurisdiction to the Court of Appeals for the Second Circuit under 28 U. S. C. § 1292 (b). The Court of Appeals affirmed the judgment of the District Court that jurisdiction to hear the suit existed as to three of the challenged regulations, but sustained the Government's contention that judicial review was improper as to a fourth. 360 F. 2d 677.

Each side below sought review here from the portions of the Court of Appeals' decision adverse to it, the Government as petitioner in *Gardner* v. *Toilet Goods Assn.*, No. 438, and the Toilet Goods Association and other plaintiffs in the present case. We granted certiorari in both instances, 385 U. S. 813, as we did in *Abbott Laboratories* v. *Gardner*, No. 39, 383 U. S. 924, because of the apparent conflict between the Second and Third Circuits. The two *Toilet Goods* cases were set and argued together with *Abbott Laboratories*.

In our decisions reversing the judgment in *Abbott Laboratories*, *ante*, p. 136, and affirming the judgment in *Gardner* v. *Toilet Goods Assn.*, *post*, p. 167, both decided today, we hold that nothing in the Food, Drug, and Cosmetic Act, 52 Stat. 1040, as amended, bars a preenforcement suit under the Administrative Procedure Act, 5 U. S. C. §§ 701–704 (1964 ed., Supp. II), and the Declaratory Judgment Act, 28 U. S. C. § 2201. We nevertheless agree with the Court of Appeals that judicial review of this particular regulation in this particular context is inappropriate at this stage because, applying

the standards set forth in *Abbott Laboratories* v. *Gardner*, the controversy is not presently ripe for adjudication.

The regulation in issue here was promulgated under the Color Additive Amendments of 1960, 74 Stat. 397, 21 U. S. C. §§ 321–376, a statute that revised and somewhat broadened the authority of the Commissioner to control the ingredients added to foods, drugs, and cosmetics that impart color to them. The Commissioner of Food and Drugs, exercising power delegated by the Secretary, 22 Fed. Reg. 1051, 25 Fed. Reg. 8625, under statutory authority "to promulgate regulations for the efficient enforcement" of the Act, § 701 (a), 21 U. S. C. § 371 (a), issued the following regulation after due public notice, 26 Fed. Reg. 679, and consideration of comments submitted by interested parties:

> "(a) When it appears to the Commissioner that a person has:
>
> . . . . .
>
> "(4) Refused to permit duly authorized employees of the Food and Drug Administration free access to all manufacturing facilities, processes, and formulae involved in the manufacture of color additives and intermediates from which such color additives are derived;
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> "he may immediately suspend certification service to such person and may continue such suspension until adequate corrective action has been taken." 28 Fed. Reg. 6445–6446; 21 CFR § 8.28.[1]

[1] The Color Additive Amendments provide for listings of color additives by the Secretary "if and to the extent that such additives are suitable and safe . . . ." § 706 (b)(1), 21 U. S. C. § 376 (b)(1). The Secretary is further authorized to provide "for the certification, with safe diluents or without diluents, of batches of color additives . . . ." § 706 (c), 21 U. S. C. § 376 (c). A color additive is "deemed unsafe" unless it is either from a certified batch or

The petitioners maintain that this regulation is an impermissible exercise of authority, that the FDA has long sought congressional authorization for free access to facilities, processes, and formulae (see, *e. g.*, the proposed "Drug and Factory Inspection Amendments of 1962," H. R. 11581, 87th Cong., 2d Sess.; Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 11581 and H. R. 11582, 87th Cong., 2d Sess., 67–74; H. R. 6788, 88th Cong., 1st Sess.), but that Congress has always denied the agency this power except for prescription drugs. § 704, 21 U. S. C. § 374. Framed in this way, we agree with petitioners that a "legal" issue is raised, but nevertheless we are not persuaded that the present suit is properly maintainable.

In determining whether a challenge to an administrative regulation is ripe for review a twofold inquiry must be made: first to determine whether the issues tendered are appropriate for judicial resolution, and second to assess the hardship to the parties if judicial relief is denied at that stage.

As to the first of these factors, we agree with the Court of Appeals that the legal issue as presently framed is not appropriate for judicial resolution. This is not because the regulation is not the agency's considered and formalized determination, for we are in agreement with petitioners that under this Court's decisions in *Frozen Food Express* v. *United States*, 351 U. S. 40, and *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192, there can be no question that this regulation—promulgated in a formal manner after notice and evaluation of submitted comments—is a "final agency action" under § 10 of the Administrative Procedure Act, 5 U. S. C. § 704.

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exempted from the certification requirement, § 706 (a), 21 U. S. C. § 376 (a). A cosmetic containing such an "unsafe" additive is deemed to be adulterated, § 601 (e), 21 U. S. C. § 361 (e), and is prohibited from interstate commerce. § 301 (a), 21 U. S. C. § 331 (a).

See *Abbott Laboratories* v. *Gardner, ante,* p. 136. Also, we recognize the force of petitioners' contention that the issue as they have framed it presents a purely legal question: whether the regulation is totally beyond the agency's power under the statute, the type of legal issue that courts have occasionally dealt with without requiring a specific attempt at enforcement, *Columbia Broadcasting System* v. *United States,* 316 U. S. 407; cf. *Pierce* v. *Society of Sisters,* 268 U. S. 510, or exhaustion of administrative remedies, *Allen* v. *Grand Central Aircraft Co.,* 347 U. S. 535; *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557.

These points which support the appropriateness of judicial resolution are, however, outweighed by other considerations. The regulation serves notice only that the Commissioner *may* under certain circumstances order inspection of certain facilities and data, and that further certification of additives *may* be refused to those who decline to permit a duly authorized inspection until they have complied in that regard. At this juncture we have no idea whether or when such an inspection will be ordered and what reasons the Commissioner will give to justify his order. The statutory authority asserted for the regulation is the power to promulgate regulations "for the efficient enforcement" of the Act, § 701 (a). Whether the regulation is justified thus depends not only, as petitioners appear to suggest, on whether Congress refused to include a specific section of the Act authorizing such inspections, although this factor is to be sure a highly relevant one, but also on whether the statutory scheme as a whole justified promulgation of the regulation. See *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, 47. This will depend not merely on an inquiry into statutory purpose, but concurrently on an understanding of what types of enforcement problems are encountered by the FDA, the need for various sorts of supervision in order to effec-

tuate the goals of the Act, and the safeguards devised to protect legitimate trade secrets (see 21 CFR § 130.14 (c)). We believe that judicial appraisal of these factors is likely to stand on a much surer footing in the context of a specific application of this regulation than could be the case in the framework of the generalized challenge made here.

We are also led to this result by considerations of the effect on the petitioners of the regulation, for the test of ripeness, as we have noted, depends not only on how adequately a court can deal with the legal issue presented, but also on the degree and nature of the regulation's present effect on those seeking relief. The regulation challenged here is not analogous to those that were involved in *Columbia Broadcasting System, supra,* and *Storer, supra,* and those other color additive regulations with which we deal in *Gardner* v. *Toilet Goods Assn., post,* p. 167, where the impact of the administrative action could be said to be felt immediately by those subject to it in conducting their day-to-day affairs. See also *Federal Communications Comm'n* v. *American Broadcasting Co.,* 347 U. S. 284.

This is not a situation in which primary conduct is affected—when contracts must be negotiated, ingredients tested or substituted, or special records compiled. This regulation merely states that the Commissioner may authorize inspectors to examine certain processes or formulae; no advance action is required of cosmetics manufacturers, who since the enactment of the 1938 Act have been under a statutory duty to permit reasonable inspection of a "factory, warehouse, establishment, or vehicle and all pertinent equipment, finished and unfinished materials; containers, and labeling therein." § 704 (a). Moreover, no irremediable adverse consequences flow from requiring a later challenge to this regulation by a manufacturer who refuses to allow this type

of inspection. Unlike the other regulations challenged in this action, in which seizure of goods, heavy fines, adverse publicity for distributing "adulterated" goods, and possible criminal liability might penalize failure to comply, see *Gardner* v. *Toilet Goods Assn., post,* p. 167, a refusal to admit an inspector here would at most lead only to a suspension of certification services to the particular party, a determination that can then be promptly challenged through an administrative procedure,[2] which in turn is reviewable by a court.[3] Such review will provide an adequate forum for testing the regulation in a concrete situation.

It is true that the administrative hearing will deal with the "factual basis" of the suspension, from which petitioners infer that the Commissioner will not entertain and consider a challenge to his statutory authority to pro-

[2] See 21 CFR §§ 8.28 (b), 130.14–130.26. We recognize that a denial of certification might under certain circumstances cause inconvenience and possibly hardship, depending upon such factors as how large a supply of certified additives the particular manufacturer may have, how rapidly the administrative hearing and judicial review are conducted, and what temporary remedial or protective provisions, such as compliance with a reservation pending litigation, might be available to a manufacturer testing the regulation. In the context of the present case we need only say that such inconvenience is speculative and we have been provided with no information that would support an assumption that much weight should be attached to this possibility.

[3] The statute and regulations are not explicit as to whether review would lie, as Judge Friendly suggested, 360 F. 2d, at 687, to a court of appeals under §§ 701 (f) and 706 (d) of the Act, or to a district court as an appeal from the Commissioner's "final order," 21 CFR § 130.26, under § 10 of the Administrative Procedure Act. See 21 CFR § 130.31; compare § 505, 21 U. S. C. § 355. For purposes of this case it is only necessary to ascertain that judicial review would be available to challenge any specific order of the Commisioner denying certification services to a particular drug manufacturer, and we therefore need not decide the statutory question of which forum would be appropriate for such review.

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mulgate the regulation.[4] Whether or not this assumption is correct, given the fact that only minimal, if any, adverse consequences will face petitioners if they challenge the regulation in this manner, we think it wiser to require them to exhaust this administrative process through which the factual basis of the inspection order will certainly be aired and where more light may be thrown on the Commissioner's statutory and practical justifications for the regulation. Compare *Federal Security Adm'r* v. *Quaker Oats Co.*, 318 U. S. 218.[5] Judicial review will then be available, and a court at that juncture will be in a better position to deal with the question of statutory authority. Administrative Procedure Act § 10 (e)(B)(3), 5 U. S. C. § 706 (2)(C).

For these reasons the judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE DOUGLAS dissents for the reasons stated by Judge Tyler of the District Court, 235 F. Supp. 648, 651–652.

MR. JUSTICE BRENNAN took no part in the consideration or decision of this case.

[For concurring opinion of MR. JUSTICE FORTAS, see *post*, p. 174.]

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[4] Petitioners also cite the Commissioner's refusal, in the context of a public hearing on certain drug regulations, to entertain objections to his statutory authority to promulgate them on the ground that "This is a question of law and cannot be resolved by the taking of evidence at a public hearing." 31 Fed. Reg. 7174.

[5] See 3 Davis, Administrative Law Treatise § 20.03, at 69 (1958).

Syllabus.

GARDNER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. *v.* TOILET GOODS ASSOCIATION, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 438. Argued January 16, 1967.—Decided May 22, 1967.

The Commissioner of Food and Drugs, by delegation from the Secretary of Health, Education, and Welfare, issued three regulations under the Color Additive Amendments of 1960 to the Federal Food, Drug, and Cosmetic Act, which the respondents challenge in a pre-enforcement action on the ground that the Commissioner impermissibly expanded the reach of the statute. The regulations (1) amplified the statutory definition of color additives by including diluents therein, (2) included certain cosmetics within the scope of color additives, and (3) limited the exemption for hair dyes to those as to which the "patch test" is effective and excluded from the exemption certain components other than the coloring ingredient of the dye. The Court of Appeals affirmed the District Court's judgment that it had jurisdiction to hear the suit. See *Toilet Goods Assn.* v. *Gardner, ante,* p. 158. *Held:* Under the standards set forth in *Abbott Laboratories* v. *Gardner, ante,* p. 136, namely, the appropriateness of the issues for judicial determination and the immediate severity of the regulations' impact on the respondents, the pre-enforcement challenge to these regulations is ripe for judicial review. Pp. 170–174.

(a) The issue as framed by the parties, what general classifications of ingredients fall within the coverage of the Color Additive Amendments, is a straightforward legal one, the consideration of which would not necessarily be facilitated if it were raised in the context of a specific attempt to enforce the regulations. Pp. 170–171.

(b) These regulations, which are self-executing, have an immediate and substantial impact on the respondents, providing extensive penalties and substantial preliminary paper work, scientific testing, and recordkeeping for the cosmetic manufacturers. Pp. 171–174.

360 F. 2d 677, affirmed.

Nathan Lewin argued the cause for petitioners. With him on the briefs were *Solicitor General Marshall, As-*

sistant Attorney General Vinson, Beatrice Rosenberg, Jerome M. Feit and *William W. Goodrich.*

Edward J. Ross argued the cause and filed a brief for respondents.

MR. JUSTICE HARLAN delivered the opinion of the Court.

In *Toilet Goods Assn.* v. *Gardner, ante,* p. 158, we affirmed a judgment of the Court of Appeals for the Second Circuit holding that judicial review of a regulation concerning inspection of cosmetics factories was improper in a pre-enforcement suit for injunctive and declaratory judgment relief. The present case is brought here by the Government seeking review of the Court of Appeals' further holding that review of three other regulations in this type of action was proper. 360 F. 2d 677. We likewise affirm.

For reasons stated in our opinion in *Abbott Laboratories* v. *Gardner, ante,* p. 136, we find nothing in the Federal Food, Drug, and Cosmetic Act (52 Stat. 1040, as amended), 21 U. S. C. § 301 *et seq.*, that precludes resort to the courts for pre-enforcement relief under the Administrative Procedure Act, 5 U. S. C. §§ 701–704 (1964 ed., Supp. II), and the Declaratory Judgment Act, 28 U. S. C. § 2201. And for reasons to follow, we believe the Court of Appeals was correct in holding that the District Court did not err when it refused to dismiss the complaint with respect to these regulations.

The regulations challenged here were promulgated under the Color Additive Amendments of 1960, 74 Stat. 397, 21 U. S. C. §§ 321–376. These statutory provisions, in brief, allow the Secretary of Health, Education, and Welfare and his delegate, the Commissioner of Food and Drugs, 22 Fed. Reg. 1051, 25 Fed. Reg. 8625, to prescribe conditions for the use of color additives in foods, drugs, and cosmetics. The Act requires clearance of every color additive in the form of a regulation prescribing condi-

tions for use of that particular additive, and also certification of each "batch" unless exempted by regulation. A color additive is defined as "a dye, pigment, or other substance . . . [which] when added or applied to a food, drug, or cosmetic, or to the human body or any part thereof, is capable (alone or through reaction with other substance) of imparting color thereto . . . ," 21 U. S. C. § 321(t)(1).

Under his general rule-making power, § 701 (a), 21 U. S. C. § 371 (a), the Commissioner amplified the statutory definition to include as color additives all diluents, that is, "any component of a color additive mixture that is not of itself a color additive and has been intentionally mixed therein to facilitate the use of the mixture in coloring foods, drugs, or cosmetics or in coloring the human body." 21 CFR § 8.1 (m). By including all diluents as color additives, the Commissioner in respondents' view unlawfully expanded the number of items that must comply with the premarketing clearance procedure.

The Commissioner also included as a color additive within the coverage of the statute any "substance that, when applied to the human body results in coloring . . . unless the function of coloring is purely incidental to its intended use, such as in the case of deodorants. Lipstick, rouge, eye makeup colors, and related cosmetics intended for coloring the human body are 'color additives.'" 21 CFR § 8.1 (f). Respondents alleged that in promulgating this regulation the Commissioner again impermissibly expanded the reach of the statute beyond the clear intention of Congress.

A third regulation challenged by these respondents concerns the statutory exemption for hair dyes that conform to a statutory requirement set out in § 601 (e), 21 U. S. C. § 361 (e). That requirement provides that hair dyes are totally exempt from coverage of the statute if they display a certain cautionary notice on their labels

prescribing a "patch test" to determine whether the dye will cause skin irritation on the particular user. The Commissioner's regulation recognizes that the exemption applies to the Color Additive Amendments, but goes on to declare: "If the poisonous or deleterious substance in the 'hair dye' is one to which the caution is inapplicable and for which patch-testing provides no safeguard, the exemption does not apply; nor does the exemption extend to the poisonous or deleterious diluents that may be introduced as wetting agents, hair conditioners, emulsifiers, or other components in a color shampoo, rinse, tint, or similar dual-purpose cosmetics that alter the color of the hair." 21 CFR § 8.1 (u).

Respondents contend that this regulation too is irreconcilable with the statute: whereas the statute grants an across-the-board exemption to all hair dyes meeting the patch-test notice requirement, the regulation purports to limit that exemption to cover only those dyes as to which the test is "effective." Moreover, it is said, the regulation appears to limit the exemption only to the coloring ingredient of the dye, and to require clearance for all other components of a particular hair dye.

We agree with the Court of Appeals that respondents' challenge to these regulations is ripe for judicial review under the standards elaborated in *Abbott Laboratories* v. *Gardner, supra,* namely the appropriateness of the issues for judicial determination and the immediate severity of the regulations' impact upon the plaintiffs.

The issue as framed by the parties is a straightforward legal one: what general classifications of ingredients fall within the coverage of the Color Additive Amendments? Both the Government and the respondents agree that for any color additive, distribution is forbidden unless the additive is (1) listed in a Food and Drug Administration regulation as safe for use under prescribed conditions, and (2) comes from a "certified" batch, unless

specifically exempted from the certification requirement. The only question raised is what sort of items are "color additives." The three regulations outlined above purport to elaborate the statutory definition; they include within the statutory term certain classes of items, *e. g.*, diluents, finished cosmetics, and hair dyes, that respondents assert are not within the purview of the statute at all. We agree with the District Court and the Court of Appeals that this is not a situation in which consideration of the underlying legal issues would necessarily be facilitated if they were raised in the context of a specific attempt to enforce the regulations.[1] Rather, "to the extent that they purport to apply premarketing requirements to broad categories like finished products and non-coloring ingredients and define the hair-dye exemption, they appear, *prima facie*, to be susceptible of reasoned comparison with the statutory mandate without inquiry into factual issues that ought to be first ventilated before the agency." 360 F. 2d, at 685.

For these reasons we find no bar to consideration by the courts of these issues in their present posture. *Abbott Laboratories* v. *Gardner, supra; United States* v. *Storer Broadcasting Co.*, 351 U. S. 192; *Frozen Food Express* v. *United States*, 351 U. S. 40.

This result is supported as well by the fact that these regulations are self-executing, and have an immediate and substantial impact upon the respondents. See *Abbott Laboratories* v. *Gardner, ante*, pp. 152–153. The Act, as noted earlier, prescribes penalties for the distribution of

[1] We use "necessarily" advisedly, because this case arises on a motion to dismiss. The District Court also denied respondents' motion for summary judgment, and called for an evidentiary hearing. If in the course of further proceedings the District Court is persuaded that technical questions are raised that require a more concrete setting for proper adjudication, a different issue will be presented.

goods containing color additives unless they have been cleared both by listing in a regulation and by certification of the particular batch. Faced with these regulations the respondents are placed in a quandary. On the one hand they can, as the Government suggests, refuse to comply, continue to distribute products that they believe do not fall within the purview of the Act, and test the regulations by defending against government criminal, seizure, or injunctive suits against them. We agree with the respondents that this proposed avenue of review is beset with penalties and other impediments rendering it inadequate as a satisfactory alternative to the present declaratory judgment action.

The penalties to which cosmetics manufacturers might be subject are extensive. A color additive that does not meet the premarketing clearance procedure is declared to be "unsafe," § 706 (a), 21 U. S. C. § 376 (a), and hence "adulterated," § 601, 21 U. S. C. § 361 (e). It is a "prohibited act" to introduce such material into commerce, § 301, 21 U. S. C. § 331, subject to injunction, § 302, 21 U. S. C. § 332, criminal penalties, § 303, 21 U. S. C. § 333, and seizure of the goods, § 304 (a), 21 U. S. C. § 334 (a). The price of noncompliance is not limited to these formal penalties. Respondents note the importance of public good will in their industry, and not without reason fear the disastrous impact of an announcement that their cosmetics have been seized as "adulterated."

The alternative to challenging the regulations through noncompliance is, of course, to submit to the regulations and present the various ingredients embraced in them for premarketing clearance. We cannot say on this record that the burden of such a course is other than substantial, accepting, as we must on a motion to dismiss on the pleadings, the allegations of the complaint and supporting affidavits as true. The regulations in this area require separate petitions for listing each color additive,

21 CFR §§ 8.1 (f), 8.1 (m), 8.4 (c), at an initial fee, subject to refunds, of $2,600 a listing. 21 CFR § 8.50 (c). One respondent, Kolmar Laboratories, Inc., in affidavits submitted to the District Court, asserted that more than 2,700 different formulae would fall under the Commissioner's regulations and would cost some $7,000,000 in listing fees alone. According to the allegations the company also uses 264 diluents which under the challenged regulations must be included as color additives as well. Moreover, a listing is not obtained by mere application alone. Physical and chemical tests must be made and their results submitted with each petition, 21 CFR § 8.4 (c), at a cost alleged by Kolmar of up to $42,000,000. Detailed records must be maintained for each listed ingredient, 21 CFR § 8.26, and batches of listed items must ultimately be certified, again at a substantial fee, 21 CFR § 8.51.

Whether or not these cost estimates are exaggerated [2] it is quite clear that if respondents, failing judicial review at this stage, elect to comply with the regulations and await ultimate judicial determination of the validity of them in subsequent litigation, the amount of preliminary paper work, scientific testing, and recordkeeping will be substantial. The District Court found in denying the motion to dismiss: "I conclude that in a substantial and practical business sense plaintiffs are threatened with irreparable injury by the obviously intended consequences of the challenged regulations, and that to resort to later piecemeal resolution of the controversy in the context of individual enforcement proceedings would be costly and

[2] The Court of Appeals observed that "Very likely these figures are exaggerated . . . ." 360 F. 2d, at 682, n. 5. The District Court stated that "While this amount is immediately suspect, there can be little doubt but that the added recordskeeping and laboratory testing costs in themselves will be extremely burdensome for all of the plaintiffs." 235 F. Supp. 648, 652. (Footnote omitted.)

inefficient, not only for the plaintiffs but as well for the public as represented by the defendants." 235 F. Supp. 648, 651.

Like the Court of Appeals, we think that this record supports those findings and conclusions. And as in *Abbott Laboratories, supra,* we have been shown no substantial governmental interest that should lead us to reach a conclusion different from the one we have reached in that case. We hold that this action is maintainable.

Affirmed.

MR. JUSTICE BRENNAN took no part in the consideration or decision of this case.

MR. JUSTICE FORTAS, with whom THE CHIEF JUSTICE and MR. JUSTICE CLARK join, concurring in No. 336, and dissenting in Nos. 39 and 438.

I am in agreement with the Court in No. 336, *Toilet Goods Assn.* v. *Gardner,* that we should affirm the decision of the Court of Appeals for the Second Circuit holding that the authority of the Secretary of Health, Education, and Welfare to promulgate the regulation there involved may not be challenged by injunctive or declaratory judgment action. The regulation (hereinafter referred to as the "access" regulation) was issued under the 1960 Color Additive Amendments to the Federal Food, Drug, and Cosmetic Act. 74 Stat. 397, 21 U. S. C. §§ 321–376. It requires that manufacturers afford employees of the agency access to all manufacturing facilities, processes, and formulae involved in the manufacture of color additives and intermediates, and provides that the Commissioner of Food and Drugs "may immediately suspend certification service" so long as access is denied. 28 Fed. Reg. 6446, 21 CFR § 8.28.

I am, however, compelled to dissent from the decisions of the Court in No. 39, *Abbott Laboratories* v. *Gardner,*

and No. 438, *Gardner* v. *Toilet Goods Assn.* These cases also involve regulations promulgated under the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, as amended, 21 U. S. C. § 301 *et seq.* No. 438, like No. 336, arises under the Color Additive Amendments of 1960. The regulations implement the statutory definition of color additives to include diluents, finished cosmetics and certain hair dyes (the "definition" regulations). The regulation in No. 39 implements amendments to the Act adopted in 1962 by requiring that "every time" the proprietary or trade-mark name of a drug appears on labels and other printed materials, the "established" or generic name must accompany it (the "every time" regulation).

The issues considered by the Court are not constitutional questions. The Court does not rest upon any asserted right to challenge the regulations at this time because the agency lacks authority to promulgate the regulations as to the subject matters involved, or because its procedures have been arbitrary or unreasonable. Its decision is based solely upon the claim of right to challenge these particular regulations at this time on the ground that they are erroneous exercises of the agency's power. It is solely on this point that the Court in these two cases authorizes threshold or pre-enforcement challenge by action for injunction and declaratory relief to suspend the operation of the regulations in their entirety and without reference to particular factual situations.

With all respect, I submit that established principles of jurisprudence, solidly rooted in the constitutional structure of our Government, require that the courts should not intervene in the administrative process at this stage, under these facts and in this gross, shotgun fashion. With all respect, I submit that the governing principles of law do not permit a different result in these cases than

in No. 336. In none of these cases is judicial interference warranted at this stage, in this fashion, and to test—on a gross, free-wheeling basis—whether the content of these regulations is within the statutory intendment. The contrary is dictated by a proper regard for the purpose of the regulatory statute and the requirements of effective administration; and by regard for the salutary rule that courts should pass upon concrete, specific questions in a particularized setting rather than upon a general controversy divorced from particular facts.

The Court, by today's decisions in Nos. 39 and 438, has opened Pandora's box. Federal injunctions will now threaten programs of vast importance to the public welfare. The Court's holding here strikes at programs for the public health. The dangerous precedent goes even further. It is cold comfort—it is little more than delusion—to read in the Court's opinion that "It is scarcely to be doubted that a court would refuse to postpone the effective date of an agency action if the Government could show . . . that delay would be detrimental to the public health or safety." Experience dictates, on the contrary, that it can hardly be hoped that some federal judge somewhere will not be moved as the Court is here, by the cries of anguish and distress of those regulated, to grant a disruptive injunction.

The difference between the majority and me in these cases is not with respect to the existence of jurisdiction to enjoin, but to the definition of occasions on which such jurisdiction may be invoked. I do not doubt that there is residual judicial power in some extreme and limited situations to enjoin administrative actions even in the absence of specific statutory provision where the agency has acted unconstitutionally or without jurisdiction—as distinguished from an allegedly erroneous action. But the Court's opinions in No. 39 and No. 438 appear to proceed on the principle that, even where no consti-

tutional issues or questions of administrative jurisdiction or of arbitrary procedure are involved, exercise of judicial power to enjoin allegedly erroneous regulatory action is permissible unless Congress has explicitly prohibited it, provided only that the controversy is "ripe" for judicial determination. This is a rule that is novel in its breadth and destructive in its implications as illustrated by the present application. As will appear, I believe that this approach improperly and unwisely gives individual federal district judges a roving commission to halt the regulatory process, and to do so on the basis of abstractions and generalities instead of concrete fact situations, and that it impermissibly broadens the license of the courts to intervene in administrative action by means of a threshold suit for injunction rather than by the method provided by statute.

The Administrative Procedure Act [1] and fundamental principles of our jurisprudence [2] insist that there must be some type of effective judicial review of final, substantive agency action which seriously affects personal or property rights. But, "[a]ll constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced . . . . In such a case the specification of one remedy normally excludes another." *Switchmen's Union* v. *Board*, 320 U. S. 297, 301 (1943). Where Congress has provided a method of review, the requisite showing to induce the courts otherwise to bring a governmental program to a halt may not be made by a mere showing of the impact of the regulation and the customary hardships of interim compliance. At least in cases

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[1] 5 U. S. C. §§ 701–704 (1964 ed., Supp. II).

[2] See *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 84 (1936) (concurring opinion of Mr. Justice Brandeis). Hart & Wechsler, The Federal Courts and the Federal System 312–340 (1953). Compare, 4 Davis, Administrative Law Treatise § 28.18 (1958).

where the claim is of erroneous action rather than the lack of jurisdiction or denial of procedural due process, a suit for injunctive or declaratory relief will not lie absent a clear demonstration that the type of review available under the statute would not be "adequate," that the controversies are otherwise "ripe" for judicial decision, and that no public interest exists which offsets the private values which the litigation seeks to vindicate. As I shall discuss, no such showing is or can be made here.

I.

Since enactment of the Federal Food, Drug, and Cosmetic Act in 1938, the mechanism for judicial review of agency actions under its provisions has been well understood. Except for specific types of agency regulations and actions to which I shall refer, judicial review has been confined to enforcement actions instituted by the Attorney General on recommendation of the agency. As the recurrent debate over this technique demonstrates, this restricted avenue for challenge has been deemed necessary because of the direct and urgent relationship of the field of regulation to the public health.[3] It is this avenue that applies with respect to the regulations at issue in the present cases.

The scheme of the Act, in this respect, is as follows: "Prohibited acts" are listed in § 301, 52 Stat. 1042, as amended, 21 U. S. C. § 331. Subsequent sections authorize the Attorney General to institute three types of proceedings. First, under § 302, 52 Stat. 1043, as amended, 21 U. S. C. § 332, he may apply to the district courts of the United States for injunctive relief. If an injunction is violated, jury trial is assured on demand of the accused. Second, under § 304, 52 Stat. 1044, as

[3] See *Ewing* v. *Mytinger & Casselberry*, 339 U. S. 594, 601 (1950).

amended, 21 U. S. C. § 334, the Attorney General may institute libel proceedings in the district courts and seek orders for seizure of any misbranded or adulterated food, drug, device, or cosmetic. Third, criminal prosecution is authorized for violations, but before the Secretary may report a violation to the Attorney General for criminal prosecution, he must afford the affected person an opportunity to present his views. §§ 303, 305, 52 Stat. 1043, 1045, as amended, 21 U. S. C. §§ 333, 335.

The present regulations concededly would be reviewable in the course of any of the above proceedings. Apart from these general provisions, the Act contains specific provisions for administrative hearing and review in the courts of appeals with respect to regulations issued under certain, enumerated provisions of the Act—not including those here involved. These appear in § 701 (f) of the Act, 52 Stat. 1055, as amended, 21 U. S. C. § 371 (f). Section 701, by subdivision (a), contains the Secretary's general authority, exercised in the present cases, to promulgate "regulations for the efficient enforcement of [the Act]." Subdivisions (e) and (f) provide for public hearings, administrative findings, and judicial review in a court of appeals with respect to those regulations specifically enumerated in subsection (e).[4] The Court agrees

[4] 21 U. S. C. § 371 (e) refers only to regulations under § 401, 52 Stat. 1046, as amended, 21 U. S. C. § 341 (identity and quality standards for food), § 403 (j), 52 Stat. 1048, as amended, 21 U. S. C. § 343 (j) (misbranded food purporting to serve special dietary purposes), § 404 (a), 52 Stat. 1048, as amended, 21 U. S. C. § 344 (a) (conditions imposed on manufacture of food as the result of health requirements), § 406, 52 Stat. 1049, as amended, 21 U. S. C. § 346 (tolerances for pesticides), § 501 (b), 52 Stat. 1049, as amended, 21 U. S. C. § 351 (b) (deviations from strength, quality, or purity standards, for drugs), § 502 (d), 52 Stat. 1050, as amended, 21 U. S. C. § 352 (d) (warnings with respect to habit-forming drugs), and § 502 (h), 52 Stat. 1051, as amended, 21 U. S. C. § 352 (h)

that this procedure applies only to the enumerated types of regulations and that the present regulations are unaffected. Then, as to the enumerated regulations which are subject to judicial review—and only as to them—subparagraph (6) of subsection (f) specifies that "[t]he remedies provided for in this subsection shall be in addition to and not in substitution for any other remedies provided by law." This "saving clause" does not apply or refer to regulations other than those enumerated, and the Court's argument to the contrary is inconsistent with the clear wording and placement of the clause.[5]

(packing and labeling of deteriorative drugs). In addition, particular sections expressly incorporate the §§ 371 (f) and (g) procedures: § 506, 55 Stat. 851, as amended, 21 U. S. C. § 356 (certain portions of regulations pertaining to certification of drugs containing insulin), § 507, 59 Stat. 463, as amended, 21 U. S. C. § 357 (with respect to regulations dealing with antibiotic drugs). Finally, § 505 (h), 52 Stat. 1053, as amended, 21 U. S. C. § 355 (h) provides that denials of certification for new drugs may be reviewed in the courts of appeals.

[5] The saving clause, subdivision (6) of subsection (f), specifically and carefully refers to the "remedies provided for in *this* subsection." (Emphasis added.) Its wording and placement would be anomalous if the saving clause were intended to have general applicability. The legislative history of the saving clause, and particularly the failure of more broadly conceived provisions to obtain acceptance by the Congress, corroborates the evidence of the clause's ultimate language and position that it was to have restricted application. See Dunn, Federal Food, Drug, and Cosmetic Act, A Statement of Its Legislative Record 184, 225, 609–610 (1938) (hereinafter cited as Dunn).

Contrary to the majority's contention, the reason for the clause and for its location in subsection (f) is clear and common-sensical. It was intended to save the remedies of injunction and declaratory judgment where the agency promulgated a subsection (e) regulation without the hearings and findings needed to permit review in the Court of Appeals. In short, as its placement indicates, it was intended to complete the scheme of pre-effectiveness review as to those carefully enumerated regulations with respect to which Con-

At various times, § 701 has been amended to include types of regulations in addition to those initially subjected to § 701 (f). Indeed, in the congressional action which included enactment of statutory provisions here in issue, the 1960 Color Additive Amendments, 74 Stat. 397, Congress amended § 701 (e), 21 U. S. C. § 376 (e) to include certain of the regulations authorized by the Color Additive Amendments. But, significantly, these did not include the regulations at issue in No. 336 and No. 438. The same is true with respect to the later Drug Amendments of 1962, 76 Stat. 780. Subsection (e) was again enlarged, but the provision involved in No. 39 was not included. These actions were taken in the course of vigorous debate as to the enforcement and review provisions which should be enacted with respect to the 1960 and 1962 amendments.

On a number of occasions Congress considered and rejected the proposal that district courts be given power to restrain by injunction the enforcement of regulations.[6] The bill that became law in 1938 originally contained provisions for hearings and judicial review in the district courts of certain specified types of regulations (substantially those later enacted as § 701, *supra*). District courts were also empowered to enjoin "any regulation promulgated in accordance with section 24" (which would include the regulations at issue in these cases,

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gress deemed pre-enforcement review to be advisable. It has no broader application.

It will come as a shock to the agency, Congress, and practitioners, that for almost 30 years this undetected, omnibus "saving clause" has slumbered in the Act.

[6] Section 23 of S. 2800, introduced in the 73d Cong., 2d Sess. (1934), for example, was such a provision and was expressly discussed on the floor of the Senate. 78 Cong. Rec. 8958–8959 (1934); Dunn 157–159. A successor bill, S. 5, 74th Cong., 1st Sess. (1935), contained a similar provision, § 702, and was approved by the Senate. 79 Cong. Rec. 8356 (1935). See Dunn 330–331, 510.

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promulgated under § 701 (a)). S. 5, 75th Cong., 1st Sess. (1937). The House Committee eliminated the latter provision and substituted what became subsection (f). This draft authorized review in a district court of regulations under subsection (e) and of those orders only.[7] Even this restricted provision for enjoining certain regulations met with bitter opposition because it "would postpone indefinitely the consumer protection" or would "hamstring" the Act's enforcement and "amount to a practical nullification . . . of the bill."[8] The Conference Committee then drafted the bill which was enacted, including the House revision of the review provision which became § 701 except for a significant change: So concerned was the Congress lest the administration of the law should be subject to judicial intervention that even with respect to the specified regulations in subsection (e) the reviewing power was placed in the courts of appeals rather than in the district courts.[9] This was to meet the criticism that "a single district judge could be found who would issue an injunction." But this is exactly what the Court today decrees. Rejected along with the original House proposal was the suggestion from the Department of Justice, set out at 83 Cong. Rec. 7892 (1938), that the Congress should leave review in the hands of the district courts' traditional injunctive powers—although the Court today resuscitates that lost cause, too.

As this Court held in *Ewing* v. *Mytinger & Casselberry*, 339 U. S. 594, 600–601 (1950), "This highly selective manner in which Congress has provided [in this Act] for judicial review reinforces the inference that the only review of the issue of probable cause [for seizure] . . . was the one provided in the libel suit."

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[7] H. R. Rep. No. 2139, 75th Cong., 3d Sess. (1938).

[8] *Id.*, Pt. II (minority statement).

[9] H. R. Conf. Rep. No. 2716, 75th Cong., 3d Sess. (1938).

In evaluating the destructive force and effect of the Court's action in these cases, it is necessary to realize that it is arming each of the federal district judges in this Nation with power to enjoin enforcement of regulations and actions under the federal law designed to protect the people of this Nation against dangerous drugs and cosmetics. Restraining orders and temporary injunctions will suspend application of these public safety laws pending years of litigation—a time schedule which these cases illustrate.[10] They are disruptive enough, regardless of the ultimate outcome. The Court's validation of this shotgun attack upon this vital law and its administration is not confined to these suits, these regulations, or these plaintiffs—or even this statute. It is a general hunting license; and I respectfully submit, a license for mischief because it authorizes aggression which is richly rewarded by delay in the subjection of private interests to programs which Congress believes to be required in the public interest. As I read the Court's opinion, it does not seriously contend that Congress authorized or contemplated this type of relief. It does not rest upon the argument that Congress intended that injunctions or threshold relief should be available. The Court seems to announce a doctrine, which is new and startling in administrative law, that the courts, in determining whether to exercise jurisdiction by injunction, will not look to see whether Congress intended that the parties should resort to another avenue of review, but will be governed by whether Congress has "prohibited"

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[10] The "every time" regulation was published about four years ago, on June 20, 1963, 28 Fed. Reg. 6375. As a result of litigation begun in September of 1963, it has not yet been put into force. The "definition" regulations and the "access" regulation with respect to color additives were published on June 22, 1963, 28 Fed. Reg. 6439, 6446. Litigation was begun in November of 1963, and the regulations are not yet operative.

injunctive relief. The Court holds that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." As authority for this, the Court produces little support. *Board of Governors* v. *Agnew*, 329 U. S. 441 (1947), involved removal from office of certain bank directors. Had the Court not authorized review, the aggrieved individuals could only test the correctness of the administrator's decision by ignoring it and risking a prison term of five years. No evidence of congressional hostility to review was adduced.[11] *Heikkila* v. *Barber*, 345 U. S. 229 (1953), does not even remotely support the Court's contention. On the contrary, it holds that a provision in the Immigration Act of 1917 to the effect that the decision of the Attorney General is "final" in deportation cases *precludes* direct attack upon a deportation order by means of suits for injunction or declaratory relief. What might be termed the other personal liberties cases relied upon by the Court are discussed below. But in cases like the present, where courts and administrative agencies both function, it has always—to this date—been accepted that the intention of Congress—not its mere failure to prohibit—will be faithfully searched out by the courts and will be implemented except in the unusual and extraordinary situations where the result would be essentially to leave the parties without any adequate right to judicial review. Compare *Leedom* v. *Kyne*, 358 U. S. 184

[11] As to the other nonpersonal liberty cases cited by the Court: In *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177 (1938), the Government did not oppose resort to the injunction remedy, and the Court enumerated special circumstances why that remedy was peculiarly needed. *Id.*, at 183–184. And in *Stark* v. *Wickard*, 321 U. S. 288 (1944), the Court noted that the aggrieved parties had no other forum in which to contest the order in question, and it found "plain" evidence of a congressional intent to allow review.

(1958), with *Switchmen's Union* v. *Board, supra; Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938); and *Adams* v. *Nagle*, 303 U. S. 532 (1938).

In effect, the Court says that the Food, Drug, and Cosmetic Act has always authorized threshold injunctions or declaratory judgment relief: that this relief has been available since the enactment of the law in 1938, and that it would have been granted in appropriate cases which are "ripe" for review. I must with respect characterize this as a surprising revelation. Despite the highly controversial nature of many provisions of such regulations under the Act, this possibility has not been realized by ingenious and aggressive counsel for the drug and food and cosmetics industries until this time. The Court's opinion and the briefs cite only a single case in which such relief has been granted prior to the present cases, and that preceded enactment of the present statutory scheme. *Morgan* v. *Nolan*, 3 F. Supp. 143 (D. C. S. D. Ind. 1933), aff'd, 69 F. 2d 471 (C. A. 7th Cir. 1934). The fact of the matter is that, except for the instances enumerated in §§ 701 (e) and (f), the avenue for attack upon the statute and regulations has been by defense to specific enforcement actions by the agency. Congress has been well aware of this for more than a generation that the statute has been in effect.[12]

Where a remedy is provided by statute, I submit that it is and has been fundamental to our law, to judicial administration, to the principle of separation of powers in our Constitution, that the courts will withhold equitable or discretionary remedies unless they conclude that the statutory remedy is inadequate. Even then, as the

[12] Indeed, Congressman Lea, principal floor manager for the bill which became the 1938 Act, told his colleagues that the review provisions of the new bill were not retroactive, and that pre-existing regulations were therefore unreviewable unless re-enacted. 83 Cong. Rec. 7776–7777 (1938).

Court recognizes, the case must be "ripe" or appropriate for threshold judicial review. Any other doctrine than this—any doctrine which so far departs from judicial restraint and judicial recognition of the power of the Congress and the administrative agencies—is bound to be disruptive. It would mean that provisions in regulatory statutes and regulations of a wide variety of administrative agencies would be subject to threshold attack because Congress has not, in addition to providing judicial review by prescribed procedures, also said to the courts, "thou shalt not enjoin *in limine*."

The limited applicability of the Administrative Procedure Act in these cases is entirely clear. That Act requires that unless precluded by Congress final agency action of the sorts involved here must be reviewable at some stage, and it recognizes that such review must be "adequate." It merely presents the question in these cases. It does not supply an answer. Certainly, it would be revolutionary doctrine that the Administrative Procedure Act authorizes threshold suits for injunction even where another and adequate review provision is available. The Court refers to the Administrative Procedure Act as "seminal." It is, in a real sense; but its seed may not produce the lush, tropical jungle of the doctrine that the Court will permit agency action to be attacked *in limine* by suit for injunction or declaratory action unless Congress expressly prohibits review of regulatory action. See 3 Davis, Administrative Law Treatise § 22.08 (1958).

I submit that if we are to judge and not to legislate policy, we should implement and not contradict the program laid out by the Congress. Congress did not intend that the regulations at issue in this case might be challenged in gross, apart from a specific controversy, or in the district courts, or by injunction or declaratory judgment action. On the contrary, the clear intent was that

the regulations, being to protect the consumer from unsafe, potentially harmful, and "misbranded" foods, drugs, devices, and cosmetics, were to be subject to challenge only by way of defense to enforcement proceedings. It was Congress' judgment, after much controversy, that the special nature of the Act and its administration required this protection against delay and disruption. We should not arrogate to ourselves the power to override this judgment. Not a single case cited by the majority in which agency action was held reviewable arose against this kind of background of legislative hostility to threshold review in the district courts.

The Court is in error, I submit, in its approach to this problem; and, as I shall attempt to show, it is in error in its decision that, even given this permissive approach to the use of judicial injunctive power, these controversies are "ripe" or appropriate for decision.

II.

I come then to the questions whether the review otherwise available under the statute is "adequate," whether the controversies are "ripe" or appropriate for review in terms of the evaluation of the competing private and public interests. I discuss these together because the questions of adequacy and ripeness or appropriateness for review are interrelated. I again note that no constitutional issues are raised, and, indeed, no issues as to the authority of the agency to issue regulations of the general sort involved. The only issue is whether that authority was properly exercised.

There is, of course, no abstract or mechanical method for determining the adequacy of review provisions. Where personal status or liberties are involved, the courts may well insist upon a considerable ease of challenging administrative orders or regulations. Cf. *Rusk* v. *Cort*, 369 U. S. 367 (1962); but cf. *Heikkila* v. *Barber*,

345 U. S. 229 (1953).[13] But in situations where a regulatory scheme designed to protect the public is involved, this Court has held that postponement of the opportunity to obtain judicial relief in the interest of avoiding disruption of the regulatory plan is entirely justifiable. *Ewing* v. *Mytinger & Casselberry*, 339 U. S. 594 (1950); cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938).[14] The *Ewing* case dramatically illustrates the point. It involves the same statute and enforcement plan as are now before us. Appellee filed suit in the United States District Court to restrain enforcement of the provision of the Food, Drug, and Cosmetic Act which authorizes multiple seizure of misbranded products. Appellee claimed that the provision was unconstitutional under the Due Process Clause, and that the agency had acted arbitrarily "in instituting" (through the Attorney General) multiple seizures without affording appellee an opportunity for hearing as to whether there was "probable cause" for the seizures. A three-judge district court was convened. It held for appellee on both issues and granted an injunction. This Court reversed on the grounds that no hearing is necessary for the administrative determination of probable cause, and that, in any event, the District Court had no jurisdiction to review that determination.[15]

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[13] See Jaffe, Judicial Control of Administrative Action 372.

[14] In *Ewing*, 339 U. S., at 599, a case under the Federal Food, Drug, and Cosmetic Act, the Court held "it is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination. *Phillips* v. *Commissioner*, 283 U. S. 589, 596–597; *Bowles* v. *Willingham*, 321 U. S. 503, 520; *Yakus* v. *United States*, 321 U. S. 414, 442–443."

[15] Where Congress has created a right but provided no avenue for judicial protection against its obliteration, suit for injunctive relief may be available under 28 U. S. C. § 1337, relating to pro-

It is no answer to *Ewing* to point out, as the Court does, that the precise determination attacked by the plaintiff was that of probable cause for recommending multiple seizures. The important point is that the Court held that the processes of the District Court could not be invoked except in the enforcement action provided by Congress. The following quotation from MR. JUSTICE DOUGLAS' opinion for the Court demonstrates the controlling force of *Ewing* in the present case:

> "Judicial review of this preliminary phase of the administrative procedure does not fit the statutory scheme nor serve the policy of the Act. Congress made numerous administrative determinations under the Act reviewable by the courts. . . . This highly selective manner in which Congress has provided for judicial review reinforces the inference that the only review of the issue of probable cause which Congress granted was the one provided in the libel suit. Cf. *Switchmen's Union* v. *Board*, 320 U. S. 297, 305–306. . . . If the District Court can step in, stay the institution of seizures, and bring the administrative regulation to a halt until it hears the case, the public will be denied the speedy protection which Congress provided by multiple seizures." 339 U. S., at 600–601.

In *Ewing*, the company's only recourse was to defend in the seizure actions, availing itself of consolidation of the multiple suits if it so desired. 339 U. S., at 602.

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ceedings "arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." See *Leedom* v. *Kyne*, 358 U. S. 184 (1958), where this Court authorized suit in the district courts to set aside an NLRB certification of a bargaining unit in which the Board had included both supervisory and nonsupervisory personnel—concededly without authority of statute. But cf. *Switchmen's Union* v. *Board*, 320 U. S. 297 (1943).

Despite the hardship and destructive publicity of multiple seizures—a more serious variety of the kind of hardship which seems profoundly to affect the Court in the present cases—this Court refused to hold that the remedy of judicial review by defense in these actions was inadequate. On the contrary, it held that "Congress weighed the potential injury to the public from misbranded articles against the injury to the purveyor of the article from a temporary interference with its distribution and decided in favor of the speedy, preventive device of multiple seizures." 339 U. S., at 601.

I submit that this Court's action in Nos. 39 and 438 sharply departs from *Ewing* and from the principles of judicial restraint and respect for congressional enactments and administrative agencies which have to this day been fundamental to our jurisprudence. The Court refers in passing to the injunctions here as "traditional avenues of judicial relief." But there is nothing "traditional" about the courts providing injunctive relief against agency action in situations where the Congress has prescribed another avenue which is available to the plaintiffs. Eloquent testimony of this is the paucity of pertinent precedents.

The three decisions of this Court principally relied upon by the majority here are primarily noteworthy for their difference rather than their analogy. In each of them the particular statutory scheme involved expressly provided for the jurisdiction of the court in which the suit was brought. In none of them is the action maintained despite congressional provision of another and different remedy.

Columbia Broadcasting System v. *United States*, 316 U. S. 407 (1942), concerned a regulation promulgated by the FCC which would have refused a license to any station which entered into defined types of network contracts. CBS, a network and not a station licensee,

brought an action to enjoin enforcement of the regulation, claiming that it was beyond the Commission's power. The action was brought under § 402 (a) of the Communications Act itself (48 Stat. 1093) which makes applicable the provisions of the Urgent Deficiencies Act to "suits to enforce, enjoin," etc., any order of the Commission with certain exceptions not here relevant. Thus, the statute itself provided for injunctive action against orders of the Commission. The only problem in the case was whether the particular order was "reviewable" at all on suit of CBS and, if so, whether the action was premature—not whether the courts might, consistently with the congressional scheme, entertain suit for injunction in proper circumstances, because that was settled by specific provisions in the Act. The Court held that the action could be maintained. And it held that CBS had no adequate alternative remedy. At most, CBS could have intervened in a proceeding controlled by a station applying for a license—if there were such a proceeding.[16] The Court therefore held that CBS could challenge the regulation before it was invoked against a licensee. This is a far cry from the present cases in which *despite* the absence of statutory authorization of district court jurisdiction over the injunctive procedure, and in face of the regulatory design, the manufacturers seek to invoke the courts' general equity power to override what appears to be the studied and deliberate intention of the Congress.

In *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192 (1956), the FCC promulgated a rule limiting to five the number of television stations which would be licensed to a single person. The same day it denied, on the basis of the rule, an application by Storer, which owned five stations, for an additional station. Storer appealed, not

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[16] As a leading commentator has noted, the basic issue was that of CBS' standing. Jaffe, *op. cit. supra*, at 394.

to the District Court, but to the Court of Appeals, for review of the Commission's rulemaking order. The Court of Appeals had jurisdiction by specific statutory provision to entertain petitions to review final orders of the Commission upon application of "[a]ny party aggrieved." 64 Stat 1130, 5 U. S. C. § 1034. This Court held that Storer had standing to maintain the petition for review, that the rule was a "final order" for review purposes and that the controversy with respect to the limitation rule was "ripe" for review. Again, the important point to note is that the case did not involve the assertion of district court jurisdiction in the absence of statute, or the overriding of administrative design or congressional intent. Storer utilized a procedure expressly made available by the statute. It sought review in the Court of Appeals where the Commission action was reviewed on the basis specified by statute, including the weight given to the agency findings and record. It did not commence a separate action, not provided for in the statute, in which the District Court's original jurisdiction was invoked. *Storer*, in brief, involves an action pursuant to the statute, and not in conflict with its plan as is true of the present cases.

The third case is *Frozen Food Express* v. *United States*, 351 U. S. 40 (1956). The ICC issued an order, after investigation and hearing, listing commodities which it found not to be "agricultural" for purposes of an exemption from the requirement of obtaining a certificate of convenience and necessity under the Interstate Commerce Act. A motor carrier sued in the United States District Court to enjoin and set aside the Commission's order. The statute under which the suit was brought expressly gives the district courts jurisdiction to enjoin, etc., "any order of the Interstate Commerce Commission." 28 U. S. C. § 1336. Accordingly, here, too, there was no question of the courts furnishing a forum which the

regulatory statute did not provide. This case, like *Columbia Broadcasting* and *Storer, supra,* therefore, does not touch the key problem of the instant cases. It is relevant only on the issue of "ripeness"—an intensely particularized inquiry involving considerations which, as I shall discuss, should lead to rejection of the instant actions.[17]

Considering the impact of these three cases on the problem of "ripeness" in the instant cases, I first note that each of these three cases is, in effect, two-dimensional. The meaning, effect, and impact of the accused rule or decision are clear, simple, and obvious. None is part of the warp and woof of an elaborate administrative pattern, intimately woven into the congressional design. None of them is apt to take different shape or to be modified by practical administrative action. None of them is subject to the give-and-take of the administrative process as it works, for example, in the realities of the complex world of food, drug, and cosmetic regulation. None of them is subject to exception upon application. None of them depends upon the independent judgment of the Attorney General for enforcement. These are stark, simple, two-dimensional regulations which do not depend upon the specifics of a particular situation for judgment as to their consonance with statutory authority nor are they subject to change in the process of administrative application. In short, in the three cases the courts proceeded within the procedural framework enacted by Congress, and the circumstances were such that the courts could make a sensible, realistic judgment as to whether the administrative rule matched the statu-

[17] MR. JUSTICE HARLAN dissented in *Frozen Food Express* on the ground that "the case falls squarely within those carefully developed rules which require that judicial intervention be withheld until administrative action has reached its complete development." 351 U. S., at 45.

tory authority.[18] These factors are entirely absent in the present cases. Analysis of the regulations in the present cases will, I believe, demonstrate the point.

In No. 336 (involving the regulation requiring "free access" to plants, processes, and formulae with respect to all "color additives") the Court concludes "that the legal issue as presently framed is not appropriate for judicial resolution." It bases its conclusion upon two factors: (1) that the Secretary may or may not order inspection, and, if denied access, he may or may not decide to use the authority of the regulation to withdraw or suspend certification without which the manufacturer may not continue his business in the products; and (2) that judgment as to whether the regulation is authorized depends upon an understanding of the types of enforcement problems encountered by FDA, the need for supervision and the safeguards devised to protect legitimate trade secrets. The Court also says that it is an adequate remedy for the manufacturer to defer challenge until after access is demanded and denied and further certification services by the agency are suspended. The suspension of certification services means a shutdown, at least *pro tanto*, but the Court says, with an optimism which is probably not shared by the industry, that "prompt" challenge through administrative procedure and court review can then be had.

Precisely the same considerations demonstrate, I submit, that the regulations in No. 39 and No. 438 should similarly be immune from attack in these suits. In No. 438, the accused regulations were also issued under § 701 (a), the general power to promulgate regulations for the efficient administration of the Act, specifically the 1960 amendments to promote "safety-in-use" of color

[18] Although *Frozen Food Express* involved problems of definition, they were not comparable to the complex, subtle, technical considerations involved in the "definition" or "every time" regulations here.

additives. As the Court states, by the regulations in No. 438 the Commissioner "amplified the statutory definition" of color additives to include diluents and certain cosmetics and hair dyes. By provisions in the statute, 74 Stat. 399, 21 U. S. C. § 376 (a)(1)(A), a product containing a "color additive" shall be deemed "adulterated" unless the color additive and its proposed use have been submitted to FDA, tested and listed in an FDA regulation as safe and unless the particular additive comes from a certified batch, or has been exempted from certification. Distribution of a product without compliance runs the risk of seizure, injunction, or criminal prosecution upon action of the Attorney General. Again, there is no question that the Commissioner could refine and "amplify" the definition of "color additives." The argument is whether he could do it in this particular way, to include these particular items.

Now, with all respect, I submit that this controversy is clearly, transparently and obviously unsuited to adjudication by the courts *in limine* or divorced from a particular controversy. Every reason advanced in No. 336 (the "access" regulation) is applicable here with equal or greater force to repel this effort to secure judicial review at this stage. (1) In No. 336, the Court pointed out that the Commissioner might or might not demand access and withdraw certification in a particular case. Similarly, in the present case it is impossible to ascertain at this stage how and whether in a particular situation the regulation will apply to that situation. First and most obvious is the fact that any manufacturer may apply for an exemption from the regulation if, as applied to his particular situation, it is unfair or unduly burdensome or—more significantly—if it falls outside of the statutory intendment. And even more than in the case of the access regulation, the definitional regulation is not self-enforcing. Indeed, in respect of the access

regulation the Commissioner may resort to a measure of self-help by withholding certification services, whereas if the FDA wishes to take action against a manufacturer who refuses to submit a "color additive" to the agency on the ground that it is not covered, the agency must institute an independent proceeding in court which it can do only if the Attorney General agrees with its conclusions.

(2) In No. 336, the Court was influenced by the obvious fact that adjudication of the legality of the access regulation requires an understanding of the enforcement problems of the agency and the actual needs for supervision. I agree. But I respectfully suggest that if this is true of a simple investigatory and enforcement regulation like that requiring access to plants and processes, it is much more compelling in respect of a complex regulation defining "color additives." How, for example, can a court possibly judge whether a substance should be included in the definition outside of the context of a specific controversy and in the absence of detailed information as to the agency problem?

The Court, however, describes the issue in No. 438 as "a straightforward legal one: what general classifications of ingredients fall within the coverage of the Color Additive Amendments?" The Court says that "this is not a situation in which consideration of the underlying legal issues would necessarily be facilitated if they were raised in the context of a specific attempt to enforce the regulations." With all respect, these statements are totally divorced from reality. For example, the statute itself includes within the definition of a "color additive" any "other substance" which "when added or applied to a food, drug, or cosmetic, or to the human body or any part thereof, is capable (alone or through reaction with another substance) of imparting color thereto." § 201 (t)(1), 74 Stat. 397, 21 U. S. C. § 321 (t)(1). Can it be seriously

contended that the question, for example, whether a particular diluent—solvent or substance serving to dilute—meets this definition is "a straightforward legal one," decision of which would not "necessarily be facilitated" if raised in specific context? I note that the Court recognizes the frailty of its pronouncement in a footnote in which it says that "If in the course of further proceedings the District Court is persuaded that technical questions are raised that require a more concrete setting for proper adjudication, a different issue will be presented"! But I submit, with respect, that this question which, even standing alone, would dictate our rejection of the action in No. 438, can and must be faced, here and now; and the answer to it is clear and obvious. It is clear beyond question, merely on the basis of the nature of the agency action, that these regulations on their face raise questions which should not be adjudicated in the abstract and in the general, but which require a "concrete setting" for determination. A threshold injunction is entirely unsuitable in these circumstances. It places the administration of a public-safety statute at the mercy of counsel's ability to marshall and deploy horrible examples which logic may accommodate, but the reality of administration would repel. Our training as lawyers and judges, our respect for the administrative process, and our awareness of the complexities of life should warn us not to fall into the trap of abstract, generalized, gross review.

The regulation in No. 39 relates to a 1962 amendment to the Act requiring manufacturers of prescription drugs to print on the labels or other printed material, the "established name" of the drug "prominently and in type at least half as large as that used thereon for any proprietary name or designation for such drug." § 502 (e)(1), 76 Stat. 790, 21 U. S. C. § 352 (e)(1). Obviously, this requires some elucidation, either case-by-case or by gen-

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eral regulation or pronouncement, because the statute does not say that this must be done "every time," or only once on each label or in each pamphlet, or once per panel, etc., or that it must be done differently on labels than on circulars, or doctors' literature than on directions to the patients, etc. This is exactly the traditional purpose and function of an administrative agency. The Commissioner, acting by delegation from the Secretary, took steps to provide for the specification. He invited and considered comments and then issued a regulation requiring that the "established name" appear every time the proprietary name is used. A manufacturer—or other person who violates this regulation—has mislabeled his product. The product may be seized; or injunction may be sought; or the mislabeler may be criminally prosecuted. In any of these actions he may challenge the regulation and obtain a judicial determination.

The Court, however, moved by petitioners' claims as to the expense and inconvenience of compliance and the risks of deferring challenge by noncompliance, decrees that the manufacturers may have their suit for injunction at this time and reverses the Third Circuit. The Court says that this confronts the manufacturer with a "real dilemma." But the fact of the matter is that the dilemma is no more than citizens face in connection with countless statutes and with the rules of the SEC, FTC, FCC, ICC, and other regulatory agencies. This has not heretofore been regarded as a basis for injunctive relief unless Congress has so provided. The overriding fact here is—or should be—that the public interest in avoiding the delay in implementing Congress' program far outweighs the private interest; and that the private interest which has so impressed the Court is no more than that which exists in respect of most regulatory statutes or agency rules. Somehow, the Court has con-

cluded that the damage to petitioners if they have to engage in the required redesign and reprint of their labels and printed materials without threshold review outweighs the damage to the public of deferring during the tedious months and years of litigation a cure for the possible danger and asserted deceit of peddling plain medicine under fancy trademarks and for fancy prices which, rightly or wrongly, impelled the Congress to enact this legislation. I submit that a much stronger showing is necessary than the expense and trouble of compliance and the risk of defiance. Actually, if the Court refused to permit this shotgun assault, experience and reasonably sophisticated common sense show that there would be orderly compliance without the disaster so dramatically predicted by the industry, reasonable adjustments by the agency in real hardship cases, and where extreme intransigence involving substantial violations occurred, enforcement actions in which legality of the regulation would be tested in specific, concrete situations. I respectfully submit that this would be the correct and appropriate result. Our refusal to respond to the vastly overdrawn cries of distress would reflect not only healthy skepticism, but our regard for a proper relationship between the courts on the one hand and Congress and the administrative agencies on the other. It would represent a reasonable solicitude for the purposes and programs of the Congress. And it would reflect appropriate modesty as to the competence of the courts. The courts cannot properly—and should not—attempt to judge in the abstract and generally whether this regulation is within the statutory scheme. Judgment as to the "every time" regulation should be made only in light of specific situations, and it may differ depending upon whether the FDA seeks to enforce it as to doctors' circulars, pamphlets for patients, labels, etc.

I submit, therefore, that this invitation to the courts to rule upon the legality of these regulations in these actions for injunction and declaratory relief should be firmly rejected. There is nothing here approaching the stringent showing that should be required before the courts will undertake to provide a remedy that Congress has not authorized but which, on the contrary, it has deliberately declined to afford. Those challenging the regulations have a remedy and there are no special reasons to relieve them of the necessity of deferring their challenge to the regulations until enforcement is undertaken. In this way, and only in this way, will the administrative process have an opportunity to function—to iron out differences, to accommodate special problems, to grant exemptions, etc. The courts do not and should not pass on these complex problems in the abstract and the general—because these regulations peculiarly depend for their quality and substance upon the facts of particular situations. We should confine ourselves—as our jurisprudence dictates—to actual, specific, particularized cases and controversies, in substance as well as in technical analysis. And we should repel these attacks, for we have no warrant and no reason to place these programs, essential to the public interest, and many others which this Court's action today will affect, at the peril of disruption by injunctive orders which can be issued by a single district judge. In short, the parties have an "adequate remedy" to test the regulations; these controversies are not "ripe" for judicial decision; and it is not appropriate that the courts should respond to the call for this private relief at disproportionate burden to the public interest. With all respect, we should refuse to accept the invitation to abandon the traditional insistence of the courts upon specific, concrete facts, and instead entertain this massive onslaught in which it will be utterly impossible to make the kind of discrete judgments which are

within judicial competence. With all respect, we should not permit the administration of a law of the Congress to be disrupted by this nonadjudicable mass assault.

MR. JUSTICE CLARK, dissenting.

I join my Brother FORTAS' dissent. As he points out the regulations here merely require common honesty and fair dealing in the sale of drugs. The pharmaceutical companies, contrary to the public interest, have through their high-sounding trademarks of long-established medicines deceitfully and exorbitantly extorted high prices therefor from the sick and the infirm. Indeed, I was so gouged myself just recently when I purchased some ordinary eyewash drops and later learned that I paid 10 times the price the drops should have cost. Likewise, a year or so ago I purchased a brand name drug for the treatment of labyrinthitis at a cost of some $12, which later I learned to buy by its established name for about $1.

The Court says that its action in so sabotaging the public interest is required because the laboratories will have to "change all their labels, advertisements, and promotional materials . . . destroy stocks of printed matter; and they must invest heavily in new printing type and new supplies." I submit that this is a lame excuse for permitting the continuance of such a dishonest practice. Rather than crying over the plight that the laboratories have brought on themselves the Court should think more of the poor ailing folks who suffer under the practice. I dare say that the practice has prevented millions from obtaining needed drugs because of the price. The labels involved here mislead the public by passing off ordinary medicines as fancy cures. The Commissioner was right in directing that the practice be stopped.

I hope that the Congress will not delay in amending the Act to close this judicial exition that the Court has unwisely opened up for the pharmaceutical companies.

SECURITIES AND EXCHANGE COMMISSION *v.* UNITED BENEFIT LIFE INSURANCE CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 428. Argued April 10, 1967.—Decided May 22, 1967.

Petitioner, the Securities and Exchange Commission (SEC), brought this action to enjoin respondent, United Benefit Life Insurance Co. (United), from offering its "Flexible Fund Annuity" contract without meeting the registration requirements of the Securities Act of 1933 and to compel United to register the "Flexible Fund" as an "investment company" pursuant to § 8 of the Investment Company Act of 1940. The "Flexible Fund" contract is a deferred, or optional, annuity plan, under which the purchaser agrees to pay a fixed monthly premium for a certain number of years. United maintains the Fund consisting of the purchasers' premiums less expenses in a separate account invested mostly in common stocks to produce capital gains as well as interest return. The cash value of a purchaser's interest, which is measured by and varies with the investment experience of the "Flexible Fund" account, may be withdrawn before maturity, or at maturity (when the purchaser's interest in the Fund ends) it may be used to purchase a conventional fixed dollar annuity. The contract also contains a provision for a guaranteed minimum cash value ranging from 50% of net premiums the first year to 100% after 10 years which is available before or at maturity. United features the program as an investment opportunity to gain through common stock investment. The SEC contended that the pre-maturity phase of the contract was separable and constituted a "security" under the Securities Act. The Court of Appeals upheld the District Court's conclusion that the contract should be considered in its entirety and thus viewed had the character of insurance and came within the optional annuity exemption in § 3 (a) of the Securities Act. Though the Court of Appeals acknowledged as controlling *S. E. C.* v. *Variable Annuity Life Insurance Co.*, 359 U. S. 65 (*VALIC*), which held that a variable annuity contract was an investment contract and not exempt from the securities laws as insurance, it read the decision only as holding that a company in order to qualify its products as insurance must bear a substantial part of the investment risk associated with the contract. The court felt that test was satisfied here by the

net premium guarantee and conversion to payments which included an interest element. Consequently, the question whether the "Flexible Fund" was an investment company under the Investment Company Act was not reached. *Held:*

1. The operation of the "Flexible Fund" contract during the pre-maturity period during which the insurer promises to serve as an investment agency is distinctly separable from the post-maturity benefit scheme which is exempted from the Securities Act. Pp. 207–209.

2. The "Flexible Fund" contract does not come within the insurance exemption of § 3 (a) of the Securities Act since the appeal to the purchaser is not on the usual basis of stability and security but on the prospect of "growth" through sound investment management. United's assumption of an investment risk by its guarantee of cash value based on net premiums (a factor given undue weight by the Court of Appeals in considering *VALIC*) cannot by itself create an insurance provision under the federal definition. Pp. 209–211.

3. The accumulation provisions of the "Flexible Fund" contract constitute an investment contract under § 2 of the Securities Act under the test that the terms of the offer shape the character of the instrument under the Act, the contract here being offered to purchasers in competition with mutual funds. Pp. 211–212.

4. The question whether the "Flexible Fund" may be separated from United's insurance activities and considered an investment company under the Investment Company Act is remanded to the Court of Appeals for further consideration. P. 212.

123 U. S. App. D. C. 305, 359 F. 2d 619, reversed and remanded.

Solicitor General Marshall argued the cause for petitioner. With him on the brief were *Robert S. Rifkind, Philip A. Loomis, Jr., Solomon Freedman, Walter P. North* and *Jacob H. Stillman.*

Daniel J. McCauley, Jr., argued the cause for respondent. With him on the brief were *Morris L. Weisberg* and *Donald F. Evans.*

Joseph B. Levin, Robert L. Augenblick and *Marc A. White* filed a brief for the Investment Company Institute et al., as *amici curiae*, urging reversal.

MR. JUSTICE HARLAN delivered the opinion of the Court.

This action was initiated by the Securities and Exchange Commission to enjoin respondent (United) from offering its "Flexible Fund Annuity" contract without undertaking the registration required by § 5 of the Securities Act of 1933,[1] and to compel United to register the "Flexible Fund" itself as an "investment company" pursuant to § 8 of the Investment Company Act of 1940.[2]

The "Flexible Fund Annuity" is a deferred, or optional, annuity plan having characteristics somewhat similar to those of the variable annuities this Court held, in *S. E. C.* v. *Variable Annuity Life Insurance Co.*, 359 U. S. 65 (*VALIC*), to be subject to the Securities Act. Like the variable annuity, it is a recent effort to meet the challenge of inflation by allowing the purchaser to reap the benefits of a professional investment program while at the same time gaining the security of an insurance annuity.[3] There are, however, significant differences between the "Flexible Fund" contract and the variable annuity, and it is claimed that these differences suffice to bring the "Flexible Fund" contract within the "optional annuity contract" exemption of § 3 (a)(8) of the Securities Act[4] and to bring the "Flexible Fund" itself within

[1] 48 Stat. 77, 15 U. S. C. § 77e.

[2] 54 Stat. 803, 15 U. S. C. § 80a–8.

[3] United's sales brochure describes the plan as featuring "a method of accumulation modernized to keep pace with today's living . . . and a chance to share in the growth of the country's economy." At the same time it is claimed that the plan "combines this new method of accumulation with the time-tested advantages of a lifetime annuity . . . a savings and accumulation plan that guarantees a lifetime income at maturity."

[4] 48 Stat. 76, 15 U. S. C. § 77c (a)(8) exempts from the operation of the Securities Act "Any insurance or endowment policy or annuity contract or optional annuity contract, issued by a corporation subject to the supervision of the insurance commissioner, bank commis-

the "insurance company" exemption of § 3 (c)(3) of the Investment Company Act, 54 Stat. 798, 15 U. S. C. § 80a–3 (c)(3).

The purchaser of a "Flexible Fund" annuity agrees to pay a fixed monthly premium for a number of years before a specified maturity date. That premium, less a deduction for expenses (the net premium), is placed in a "Flexible Fund" account which United maintains separately from its other funds, pursuant to Nebraska law. Neb. Rev. Stat. § 44–310.06 (1963 Cum. Supp.). United undertakes to invest the "Flexible Fund" with the object of producing capital gains as well as an interest return, and the major part of the fund is invested in common stocks. The purchaser, at all times before maturity, is entitled to his proportionate share of the total fund and may withdraw all or part of this interest. The purchaser is also entitled to an alternative cash value measured by a percentage of his net premiums which gradually increases from 50% of that sum in the first year to 100% after 10 years. Other features, common to conventional annuity contracts, are also incorporated in United's plan.[5]

At maturity, the purchaser may elect to receive the cash value of his policy, measured either by his interest in the fund or by the net premium guarantee, whichever is larger. He may also choose to convert his interest into a life annuity under conditions specified in the

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sioner, or any agency or officer performing like functions, of any State or Territory of the United States or the District of Columbia."

[5] For example a refund of premiums is provided in case of death before maturity. Deferred periods of varying duration may be chosen, and the purchaser may elect to turn his cash value into an annuity at a date before specified maturity. Standard incontestability clauses and assignment clauses are incorporated into the contract. The contract at issue in *S. E. C.* v. *Variable Annuity Life Insurance Co.*, 359 U. S. 65, also had some ancillary features common to all standard annuity contracts. The Court did not find them determinative. *Id.*, at 73, n. 15.

"Flexible Fund" contract. These conditions relate future benefits to dollars available at maturity so the dollar benefits to be received will vary with the cash value at maturity. However, the net premium guarantee is, because of this conversion system, also a guarantee that a certain amount of fixed-amount payment life annuity will be available at maturity.

After maturity the policyholder has no further interest in the "Flexible Fund." He has either received the value of his interest in cash, or converted to a fixed-payment annuity in which case his interest has been transferred from the "Flexible Fund" to the general reserves of the company, and mingled, on equal terms per dollar of cash value, with the interests of holders of conventional deferred annuities.

Because of the termination of interest in the "Flexible Fund" at maturity, the SEC contended that the portion of the "Flexible Fund" contract which dealt with the pre-maturity period was separable and a "security," within the meaning of the Securities Act. It was agreed that the provisions dealing with the operation of the fixed-payment annuity were purely conventional insurance provisions, and thus beyond the purview of the SEC. The District Court held that the guarantee of a fixed-payment annuity of a substantial amount gave the entire contract the character of insurance. The Court of Appeals for the District of Columbia Circuit affirmed. 123 U. S. App. D. C. 305, 359 F. 2d 619. That court rejected "the SEC's basic premise that the contract should be fragmented and the risk during the deferred period only should be considered." Considering the contract as a whole, it found, as the SEC had urged, that this Court's decision in *VALIC, supra,* was controlling. But it read that decision to hold only "that a company must bear a substantial part of the investment risk associated with the contract . . . in order to qualify its

products as 'insurance.'" 123 U. S. App. D. C., at 308, 359 F. 2d, at 622. Because of the net premium guarantee and the conversion to payments which included an interest element during the fixed-payment period, the court concluded that the "Flexible Fund" met this test. Because of the importance of the issue, and the need for clarifying the implications of the *VALIC* decision, we granted certiorari, 385 U. S. 918. We now reverse for reasons given below.

First, we do not agree with the Court of Appeals that the "Flexible Fund" contract must be characterized in its entirety. Two entirely distinct promises are included in the contract and their operation is separated at a fixed point in time. In selling a deferred annuity contract of any type, United must first decide what amount of annuity payment is to be allowed for each dollar paid into the annuity fund at maturity.[6] In making that calculation United must analyze expected mortality, interest, and expenses of administration. The outcome of that calculation is shown in the conversion table which is included in the "Flexible Fund" contract.

The second problem United must face in a deferred annuity is to determine what amount will be available for the annuity fund at maturity. In a conventional annuity where a fixed amount of benefits is stipulated it is essential that the premiums both cover expenses and produce a fund sufficient to support the promised benefits.[7] In fixing the necessary premium mortality

[6] Annuities may indeed be purchased for a single premium, and it is the basic single-premium calculation which controls the benefits of all deferred plans. See Johnson, The Variable Annuity—Insurance, Investment, or Both?, 48 Geo. L. J. 641, 655; Mehr & Osler, Modern Life Insurance 79–102 (3d ed. 1961).

[7] For such a calculation the return-of-premium provision can be considered to be a form of term insurance provided by the company and included within the expense arrangements.

experience is a subordinate factor and the planning problem is to decide what interest and expense rates may be expected. There is some shifting of risk from policyholder to insurer, but no pooling of risks among policyholders. In other words, the insurer is acting, in a role similar to that of a savings institution, and state regulation is adjusted to this role.[8] The policyholder has no direct interest in the fund[9] and the insurer has a dollar target to meet.

The "Flexible Fund" program completely reverses the role of the insurer during the accumulation period. Instead of promising to the policyholder an accumulation to a fixed amount of savings at interest, the insurer promises to serve as an investment agency and allow the policyholder to share in its investment experience. The insurer is obligated to produce no more than the guaranteed minimum at maturity, and this amount is substantially less than that guaranteed by the same premiums in a conventional deferred annuity contract.[10] The fixed-payment benefits are adjusted to reflect the number of dollars available, as opposed to the conventional annuity where the amount available is planned to reflect the promised benefits.

The insurer may plan to meet the minimum guarantee by split funding—that is, treating part of the net pre-

[8] See Huebner & Black, Life Insurance 518–524 (5th ed. 1958).

[9] See Johnson, *supra*, n. 6, at 673.

[10] The table below compares the cash values of the "Flexible Fund" contracts with those of United's standard deferred annuities:

Years	*Paid in*	*Flexible Fund guarantee*	*Respondent's standard deferred annuity*
1	1,200	300	624
5	6,000	3,461	5,460
10	12,000	10,374	12,504
20	24,000	21,774	30,792
30	36,000	33,174	54,828
40	48,000	44,574	87,156

mium as it would a premium under a conventional deferred annuity contract with a cash value at maturity equal to the minimum guarantee and investing only the remainder [11]—or by setting the minimum low enough that the risk of not being able to meet it through investment is insignificant. The latter is the course United seems to have pursued.[12] In either case the guarantee cannot be said to integrate the pre-maturity operation into the post-maturity benefit scheme. United could as easily attach a "Flexible Fund" option to a deferred life insurance contract or any other benefit which could otherwise be provided by a single payment. And the annuity portion of the contract could be offered independently of the "Flexible Fund." [13] We therefore conclude that we must assess independently the operation of the "Flexible Fund" contract during the deferred period to determine whether that separable portion of the contract falls within the class of those exempted by Congress from the requirements of the Securities Act, and, if not, whether the contract constitutes a "security" within § 2 of that Act, 48 Stat. 74, 15 U. S. C. § 77b.

The provisions to be examined are less difficult of classification than the ones presented to us in *VALIC*. There it was held that the entire plan under which benefits continued to fluctuate with the fortunes of the fund

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[11] See O'Brien, Static Dollars? Dynamic Dollars? Why Not Have Both!, Apr. 25, 1960 Investment Dealers' Digest (Mutual Fund Supplement) 56. Cf. *Spellacy* v. *American Life Ins. Assn.*, 144 Conn. 346, 131 A. 2d 834.

[12] The record shows that United set its guarantee by analyzing the performance of common stocks during the first half of the 20th century and adjusting the guarantee so that it would not have become operable under any prior conditions.

[13] Advisers Fund, Inc., a mutual fund, sells shares on an installment plan and simultaneously guarantees that an affiliated insurance company will allow the proceeds on redemption to be applied to the purchase of an annuity at specified conversion rates.

after maturity, was not a contract of insurance within the § 3 (a) exemption. A pooling of mortality risk was operative during the payment period, and the contract was one of insurance under state law, but a majority of this Court held that "the meaning of 'insurance' . . . under these Federal Acts is a federal question," 359 U. S., at 69, and "that the concept of 'insurance' involves some investment risk-taking on the part of the company." *Id.*, at 71. The argument "that the existence of adequate state regulation was the basis for the exemption [the position taken by four dissenting Justices] . . . was conclusively rejected . . . in VALIC for the reason that variable annuities are 'securities' and involve considerations of investment not present in the conventional contract of insurance." *Prudential Insurance Co.* v. *S. E. C.*, 326 F. 2d 383, 388. It was implied in the majority opinion in *VALIC* and made explicit by the two concurring Justices,[14] that the exemption was to be considered a congressional declaration "that there then was a form of 'investment' known as insurance (including 'annuity contracts') which did not present very squarely the sort of problems that the Securities Act . . . [was] devised to deal with, and which were, in many details, subject to a form of state regulation of a sort which made the federal regulation even less relevant." *VALIC*, at 75 (opinion of BRENNAN, J.). In considering *VALIC* to have turned solely on the absence of any substantial investment risk-taking on the part of the insurer there, we think that the Court of Appeals in the present case viewed that decision too narrowly.

Approaching the accumulation portion of this contract, in this light, we have little difficulty in concluding that it does not fall within the insurance exemption of

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[14] MR. JUSTICE BRENNAN and MR. JUSTICE STEWART joined in a concurring opinion written by MR. JUSTICE BRENNAN and also joined in the opinion of the Court.

§ 3 (a) of the Securities Act. "Flexible Fund" arrangements require special modifications of state law, and are considered to appeal to the purchaser not on the usual insurance basis of stability and security but on the prospect of "growth" through sound investment management.[15] And while the guarantee of cash value based on net premiums reduces substantially the investment risk of the contract holder, the assumption of an investment risk cannot by itself create an insurance provision under the federal definition. *Helvering* v. *Le Gierse,* 312 U. S. 531, 542. The basic difference between a contract which to some degree is insured and a contract of insurance must be recognized.

We find it equally clear that the accumulation provisions constitute an "investment contract" within the terms of § 2 of the Securities Act. As the Court said in *S. E. C.* v. *Joiner Leasing Corp.,* 320 U. S. 344, 352–353, "The test . . . is what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect. In the enforcement of an act such as this it is not inappropriate that promoters' offerings be judged as being what they were represented to be." Contracts such as the "Flexible Fund" offer important competition to mutual funds, see Johnson, The Variable Annuity—Insurance, Investment, or Both?, 48 Geo. L. J. 641, and are pitched to the same consumer interest in growth through professionally managed investment. It seems eminently fair that a purchaser of such a plan be afforded the same advantages of disclosure which inure to a mutual fund purchaser under § 5 of the Securities Act. "At the state level the Uniform Securities Act makes

[15] United's primary advertisement for the "Flexible Fund" was headed "New Opportunity for Financial Growth." United's sales aid kit included displays emphasizing the possibility of investment return and the experience of United's management in professional investing.

explicit what seems to be the view of the great majority of blue sky administrators to the effect that variable annuities are securities . . . ." 1 Loss, Securities Regulation 499. Given *VALIC*, we hold that for the purposes of the Securities Act these contracts are also to be considered nonexempt securities and cannot be offered to the public without conformity to the registration requirements of § 5.

Because the courts below considered the contract itself to be exempt, they did not reach the question whether the "Flexible Fund" was an "investment company" under the Investment Company Act of 1940. In *VALIC* the sole business of the insurer was the issuance of the contracts held to be securities, and thus the Court held the insurer to be an investment company. It is clear, however, that United in the main is an insurance company exempt from the requirements of the Investment Company Act. Moreover, the provisions of that Act are substantive and go well beyond the disclosure requirements of the Securities Act. Thus the question whether the fund may be separated from United's other activities and considered an investment company is a difficult one. See Comment, 61 Mich. L. Rev. 1374; Note, Regulation of Variable Annuity Sales: The Aftermath of SEC v. VALIC, 1959 Wash. U. L. Q. 206. An investigation into the relationship between the "Flexible Fund" and United's insurance business, as well as an investigation of the possible conflicts between state and federal regulation, is required for a proper resolution. The SEC has requested us to remand the case for further consideration of this issue, and in view of its complexity, we deem this the wisest course.

The judgment of the Court of Appeals for the District of Columbia Circuit is reversed and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

Syllabus.

NORTHEASTERN PENNSYLVANIA NATIONAL BANK & TRUST CO., EXECUTOR *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 637. Argued March 20, 1967.—Decided May 22, 1967.

Decedent's will established a bequest in trust to provide for monthly payments of $300 to his widow. If the trust income were insufficient the corpus could be invaded to make the specified payments, excess income was to be accumulated, and the widow was given power to appoint the entire corpus by will. On decedent's estate tax return his executor claimed the marital deduction of one-half the gross estate, including therein the value of the trust corpus. The Commissioner of Internal Revenue determined that the trust did not qualify for the deduction because the widow's right to income was not expressed as a "fractional or percentile share" of the total trust income, as required by Treas. Reg. § 20.2056 (b)–5 (c), which interprets 26 U. S. C. § 2056 (b)(5). That provision, *inter alia*, qualifies for the deduction an interest where the surviving spouse is entitled for life to all the income from a "specific portion" of the trust corpus, with power in the surviving spouse to appoint such specific portion. The executor sued for a refund which the District Court granted on the basis that the "specific portion" of the trust whose income would amount to $300 per month could be computed and a deduction allowed for that amount, notwithstanding the Regulation. The Court of Appeals reversed. *Held:*

1. "Resolution of the question in this case, whether a qualifying 'specific portion' can be computed from the monthly stipend specified in a decedent's will, is essentially a matter of discovering the intent of Congress." In the legislative history of the marital deduction, "There is no indication whatsoever that Congress intended the deduction only to be available [where the 'specific portion' is expressed as a 'fractional or percentile share'], nor is there any apparent connection between the purposes of the deduction and such a limitation on its availability." Pp. 219–222.

2. "The Court of Appeals concluded . . . that the computation [of a 'specific portion' from the monthly stipend] could

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not be made because '[t]he market conditions for purposes of investment are unknown' and, therefore, there are no constant investment factors to use in computing the maximum possible monthly income of the whole corpus." However, while "perfect prediction of realistic future rates of return is not possible, . . . the use of projected rates of return in the administration of the federal tax laws is hardly an innovation. . . . It should not be a difficult matter to settle on a rate of return available to a trustee under reasonable investment conditions. . . ." Pp. 223–224.

3. Such computation of a "specific portion" as to which a right to income is given "will not result in any of the combined marital estate escaping ultimate taxation in either the decedent's or the surviving spouse's estate." The possibly different situation in the case of a power of appointment is not involved here. Pp. 224–225.

4. The "specific portion" must be determined on the basis of "the amount of the corpus required to produce the fixed monthly stipend, not . . . the present value of the right to monthly payments over an actuarially computed life expectancy." Since the latter method was used by the District Court, the case is remanded for further proceedings. P. 225.

363 F. 2d 476, reversed and remanded.

Milton I. Baldinger argued the cause for petitioner. With him on the brief was *Donald J. Fendrick.*

Richard C. Pugh argued the cause for the United States. With him on the brief were *Solicitor General Marshall, Assistant Attorney General Rogovin, Robert N. Anderson* and *Albert J. Beveridge III.*

MR. JUSTICE FORTAS delivered the opinion of the Court.

The issue in this case is whether a bequest in trust providing for the monthly payment to decedent's widow of a fixed amount can qualify for the estate tax marital deduction under § 2056 (b)(5) of the Internal Revenue Code of 1954, 26 U. S. C. § 2056 (b)(5). That section allows a marital deduction from a decedent's adjusted gross estate of up to one-half the value of the estate

in respect to specified interests which pass to the surviving spouse. Among the interests which qualify is one in which the surviving spouse "is entitled for life to . . . all the income from a specific portion [of the trust property], payable annually or at more frequent intervals, with power in the surviving spouse to appoint . . . such specific portion . . . ." [1]

At the date of decedent's death, the value of the trust corpus created by his will was $69,246. The will provided that his widow should receive $300 per month until decedent's youngest child reached 18, and $350 per month thereafter. If the trust income were insufficient, corpus could be invaded to make the specified payments; if income exceeded the monthly amount, it was to be accu-

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[1] The section reads, in full:

"(5) *Life estate with power of appointment in surviving spouse.*— In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—

"(A) the interest or such portion thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and

"(B) no part of the interest so passing shall, for purposes of paragraph (1)(A), be considered as passing to any person other than the surviving spouse.

"This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events."

mulated. The widow was given power to appoint the entire corpus by will.[2]

On decedent's estate tax return, his executor reported an adjusted gross estate of $199,750. The executor claimed the maximum marital deduction of one-half the gross estate, $99,875, on the ground that qualified interests passing to the wife exceeded that amount. The value of the property which passed to the widow outright was $41,751. To this the executor added the full value of the trust, $69,246. The Commissioner, however, determined that the trust did not qualify for the marital deduction because the widow's right to the income of the trust was not expressed as a "fractional or percentile share" of the total trust income, as the Treasury Regulation, § 20.2056 (b)–5 (c), requires. Accordingly, the Commis-

[2] The trustee was also given discretion to invade up to $1,500 of corpus in the event of the widow's illness or financial emergency. The relevant part of the will is as follows:

"ITEM 6. I give, devise and bequeath one-half (½) of all the rest, residue and remainder of my estate, whatsoever and wheresoever the same be, both real and personal, to which I may be entitled, or which I may have power to dispose of at the time of my death, unto my Trustee hereinafter named and designated, to have and to hold the same in trust, nevertheless, as hereinafter provided.

"(a) I direct my Trustee to pay out of the said income and corpus of the said estate unto my wife, Beatrice O. Young, the sum of Three Hundred Dollars ($300.00) per month for and during the period until my youngest child reaches the age of eighteen years, and thereafter I direct my Trustee to pay to my wife, Beatrice O. Young, the sum of Three Hundred Fifty Dollars ($350.00) per month for and during the rest of her natural life.

"(b) If my wife survives me, she shall have the power, exercisable by Will, to appoint to her estate, or to others, any or all of the principal remaining at the time of her death. If my wife fails to appoint the entire principal to her estate or to others as above authorized, then upon her death (or if she predeceases me, then upon my death) any principal remaining at that time shall be paid over to my children on the same terms and conditions as under Item 7 of this my Will."

sioner reduced the amount of the allowable deduction to $41,751. The resulting deficiency in estate tax was paid, a claim for refund was disallowed, the executor sued in District Court for refund, and the District Judge gave summary judgment for the executor. On appeal, the Court of Appeals for the Third Circuit, sitting *en banc*, reversed, with three judges dissenting. Because of an acknowledged conflict between the decision of the Third Circuit in this case and that of the Seventh Circuit in *United States* v. *Citizens National Bank of Evansville*, 359 F. 2d 817, petition for certiorari pending, No. 488, October Term, 1966,[3] we granted certiorari. 385 U. S. 967. We reverse.

[3] In the *Citizens National Bank* case, decedent directed the trustee to pay the surviving wife $200 per month for the two years following his death, and thereafter $300 per month; the widow was the sole beneficiary. The District Director disallowed that part of the executor-bank's claim to an estate tax marital deduction based upon the trust, and the bank sued for a refund. The District Court held in favor of the bank, and computed the allowable deduction by capitalizing the $200 monthly stipend at an assumed 3½% rate of return. The Court of Appeals affirmed, one judge dissenting.

The decision of the Court of Appeals for the Third Circuit in the present case is also in apparent conflict with a decision of the Court of Appeals for the Second Circuit in *Gelb* v. *Commissioner*, 298 F. 2d 544 (1962) (Friendly, J.). The surviving widow in *Gelb* was entitled to all the income from the trust. The trustees (of which the wife was one) were empowered to invade corpus up to $5,000 per year for the education and support of testator's youngest daughter, the payments to be made to the wife. The Court of Appeals held that the present worth of the maximum amount payable to the daughter could be computed actuarially, taking into account the joint expectancy of the widow and daughter, and could then be deducted from the total trust corpus to arrive at the "specific portion" as to which the widow was given a power of appointment. The Court of Appeals observed that "Congress spoke of a 'specific portion,' not of a 'fractional or percentile share . . . ,'" 298 F. 2d, at 550–551, and disapproved the Regulation "insofar as it would limit a 'specific portion' to 'a fractional or percentile share.'" 298 F. 2d, at 551.

The basis for the Commissioner's disallowance lay in Treasury Regulation § 20.2056 (b)–5 (c). This interpretative Regulation purports to define "specific portion" as it is used in § 2056 (b)(5) of the Code: "A partial interest in property is not treated as a specific portion of the entire interest unless the rights of the surviving spouse in income . . . constitute a fractional or percentile share of a property interest . . . ." The Regulation specifically provides that "if the annual income of the spouse is limited to a specific sum . . . the interest is not a deductible interest." [4] If this Regulation properly implements the Code, the trust in this case plainly fails to qualify for the marital deduction. We hold, however, that in the context of this case the Regulation improperly restricts the scope of the congressionally granted deduction.

In the District Court, the executor initially claimed that the entire trust qualified for the marital deduction simply because, at the time of trial, the corpus had not yet produced an income in excess of $300 per month, and that the widow was therefore entitled "to all the income from the entire interest." The District Court rejected this contention, observing that the income from

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[4] The relevant part of the Regulation is as follows:

"(c) *Definition of 'specific portion.'* A partial interest in property is not treated as a specific portion of the entire interest unless the rights of the surviving spouse in income and as to the power constitute a fractional or percentile share of a property interest so that such interest or share in the surviving spouse reflects its proportionate share of the increment or decline in the whole of the property interest to which the income rights and the power relate. Thus, if the right of the spouse to income and the power extend to one-half or a specified percentage of the property, or the equivalent, the interest is considered as a specific portion. On the other hand, if the annual income of the spouse is limited to a specific sum, or if she has a power to appoint only a specific sum out of a larger fund, the interest is not a deductible interest."

the corpus *could* exceed $300 per month, and in that event the excess would have to be accumulated. The executor's alternative claim, which the District Court accepted, was that the "specific portion" of the trust corpus whose income would amount to $300 per month could be computed, and a deduction allowed for that amount.[5]

Resolution of the question in this case, whether a qualifying "specific portion" can be computed from the monthly stipend specified in a decedent's will, is essentially a matter of discovering the intent of Congress. The general history of the marital deduction is well known. See *United States* v. *Stapf*, 375 U. S. 118, 128 (1963). The deduction was enacted in 1948, and the underlying purpose was to equalize the incidence of the estate tax in community property and common-law jurisdictions. Under a community property system a surviving spouse takes outright ownership of half of the community property, which therefore is not included in the deceased spouse's estate. The marital deduction allows transfer of up to one-half of noncommunity property to the surviving spouse free of the estate tax. Congress, however, allowed the deduction even when the interest transferred is less than the outright ownership which community property affords. In "recognition of one of the customary modes of transfer of property in common-law States," [6] the 1948 statute provided that a bequest in trust, with the surviving spouse "entitled for life to all the income from the corpus of the trust, payable annually or at more frequent intervals, with power . . .

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[5] Because the marital deduction is computed as of the date of the deceased spouse's death, *Jackson* v. *United States*, 376 U. S. 503, 508 (1964), the parties are agreed that the monthly stipend to be considered is $300 per month, not $350 per month.

[6] S. Rep. No. 1013, 80th Cong., 2d Sess. (1948), p. 28.

to appoint the entire corpus" [7] would qualify for the deduction.

The 1948 legislation required that the bequest in trust entitle the surviving spouse to "all the income" from the trust corpus, and grant a power to appoint the "entire corpus." These requirements were held by several lower courts to disqualify for the deduction a single trust in which the surviving spouse was granted a right to receive half (for example) of the income and to appoint half of the corpus.[8] Since there was no good reason to require a testator to create two separate trusts—one for his wife, the other for his children, for example—Congress in 1954 revised the marital deduction provision of the statute to allow the deduction where a decedent gives his surviving spouse "all the income from the entire interest, or all the income from a specific portion thereof" and a power to "appoint the entire interest, or such specific portion." The House Report on this change states that "The bill makes it clear that . . . a right to income plus a general power of appointment over only an undivided part of the property will qualify that part of the property for the marital deduction." [9] The Senate Report contains identical language.[10] There is no indication in the legislative history of the change from which one could conclude that Congress—in using the words "all the income from a specific portion" in the statute, or the equivalent words "a right to income . . . over . . . an

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[7] Internal Revenue Code of 1939, § 812 (e)(1)(F), as added by § 361 of the Revenue Act of 1948, c. 168, 62 Stat. 118.

[8] See, *e. g.*, *Estate of Shedd* v. *Commissioner*, 237 F. 2d 345 (C. A. 9th Cir.), cert. denied, 352 U. S. 1024 (1957); *Estate of Sweet* v. *Commissioner*, 234 F. 2d 401 (C. A. 10th Cir.), cert. denied, 352 U. S. 878 (1956). See also S. Rep. No. 1983, 85th Cong., 2d Sess., (1958), pp. 240–241.

[9] H. R. Rep. No. 1337, 83d Cong., 2d Sess. (1954), p. 92.

[10] S. Rep. No. 1622, 83d Cong., 2d Sess. (1954), p. 125.

undivided part" in the committee reports—intended that the deduction afforded would be defeated merely because the "specific portion" or the "undivided part" was not expressed by the testator in terms of a "fractional or percentile share" of the whole corpus.[11]

Congress' intent to afford a liberal "estate-splitting" possibility to married couples, where the deductible half of the decedent's estate would ultimately—if not consumed—be taxable in the estate of the survivor, is unmistakable. Indeed, in § 93 of the Technical Amendments Act of 1958, 72 Stat. 1668, Congress made "The more realistic rules of the 1954 Code" apply retroactively to the original enactment of the marital deduction in 1948, and opened the statute of limitations to allow refunds or credits for overpayments.[12] Plainly such a provision should not be construed so as to impose unwarranted restrictions upon the availability of the deduction. Yet the Government insists that even where there are well-established principles for computing the principal required to produce the monthly stipend provided for in a trust, a "specific portion" cannot be determined in that way. The "specific portion" must, the Government urges, be expressed in the trust as a fractional or percentile share of the total corpus. The spouse of a testator whose will provides for a specific monthly stipend is deprived of any benefit from the marital deduction, according to the Government's view. But we can find no warrant for that

[11] To be sure, the two reports do give an example of the simplest kind of trust covered by the change: "For example, if the decedent in his will provided for the creation of a trust under the terms of which the income from one-half of the trust property is payable to this surviving spouse with uncontrolled power in the spouse to appoint such one-half of the trust property by will, such interest will qualify . . . ." Reports, *supra*, nn. 9 and 10, at A319, 475, respectively. Obviously this example was not intended to limit the meaning of the new language.

[12] S. Rep. No. 1983, 85th Cong., 2d Sess. (1958), p. 107.

narrow view, in common sense or in the statute and its history.

The Government puts most of its reliance upon a phrase which occurred once in the legislative history of the 1948 enactment. The Senate Report stated that the marital deduction would be available "where the surviving spouse, by reason of her [*sic*] right to the income and a power of appointment, is the virtual owner of the property." [13] The Government's argument is that the deduction was intended only in cases where the equivalent of the outright ownership of a community property State was granted, and that this is what the Senate Report meant by the words "virtual owner." Actually, however, the words were not used in that context at all. The section of the Report from which those words derive deals with the rule that, with minor exceptions, the marital deduction does not apply where any person other than the surviving spouse has any power over the income or corpus of the trust. It is in this sense that the Report described the surviving spouse as a "virtual owner." Hence, the Government's argument that only a grant of the income from a fractional or percentile share subjects the surviving spouse to the vagaries and fluctuations of the economic performance of the corpus in the way an outright owner would be, is simply irrelevant. There is no indication whatsoever that Congress intended the deduction to be available only in such a situation, nor is there any apparent connection between the purposes of the deduction and such a limitation on its availability. Compare *Gelb* v. *Commissioner*, 298 F. 2d 544, 550–551 (C. A. 2d Cir. 1962). Obviously Congress did not intend the deduction to be available only with respect to interests equivalent to outright ownership, or trusts would not have been permitted to qualify at all.[14]

[13] S. Rep. No. 1013, 80th Cong., 2d Sess., pt. 2 (1948), p. 16.

[14] Cf. Note, 19 Stan. L. Rev. 468, 470–472 (1967).

The Court of Appeals advanced a somewhat different argument in support of the Government's conclusion. Without relying upon the validity of the Regulation, the Court of Appeals maintained that a "specific portion" can be found only where there is an acceptable method of computing it, and that no such method is available in a case of the present sort. The Court of Appeals noted that the computation must produce the "ratio between the maximum monthly income [producible by the whole corpus] and the monthly stipend [provided for in the trust]." 363 F. 2d 476, 484. The following example was given:

> "If the investment factors involved were constant and it could be determined that the *maximum* income that could be produced from the corpus in a month was, for example, $500 then the relationship between the $300 monthly stipend and the $500 maximum income would define 'specific portion' for marital deduction purposes, i. e.:
>
> > "$300 being ⅗ of $500 then ⅗ of $69,245.85 would be the 'specific portion' of the trust corpus from which the surviving spouse would be entitled to the entire income of $300 monthly *under maximum production circumstances.*
>
> "Though in reality it might take the entire corpus to produce the monthly stipend, or even the necessity to invade corpus might be present, nevertheless . . . it could be said, after computing the theoretical maximum income, that the surviving spouse's income interest of $300 monthly represented the investment of ⅗ of the corpus. 'Specific portion' would then be accurately defined for marital deduction purposes." (Italics in original.) 363 F. 2d, at 484, n. 17.

The Court of Appeals concluded, however, that the computation could not be made because "[t]he market conditions for purposes of investment are unknown" and, therefore, there are no constant investment factors to use in computing the maximum possible monthly income of the whole corpus. 363 F. 2d, at 484.

It is with this latter conclusion that we disagree. To be sure, perfect prediction of realistic future rates of return [15] is not possible. However, the use of projected rates of return in the administration of the federal tax laws is hardly an innovation. Cf. *Gelb* v. *Commissioner*, 298 F. 2d 544, 551, n. 7 (C. A. 2d Cir. 1962). It should not be a difficult matter to settle on a rate of return available to a trustee under reasonable investment conditions, which could be used to compute the "specific portion" of the corpus whose income is equal to the monthly stipend provided for in the trust. As the Court of Appeals for the Second Circuit observed in *Gelb, supra*, "the use of actuarial tables for dealing with estate tax problems has been so widespread and of such long standing that we cannot assume Congress would have balked at it here; the United States is in business with enough different taxpayers so that the law of averages has ample opportunity to work." 298 F. 2d, at 551–552.

The Government concedes, as it must, that application of a projected rate of return to determine the "specific portion" of the trust corpus whose income is equal to the monthly stipend allotted will not result in any of the combined marital estate escaping ultimate taxation in either the decedent's or the surviving spouse's estate. The Government argues, however, that if analogous

[15] An estimated realistic rate of return which a trustee could be expected to obtain under reasonable investment conditions must be used—absent specific restrictions upon the trustee's investment powers—in order to isolate that "part of the corpus which in [all] . . . reasonable event[s]" will produce no more than the monthly stipend, to paraphrase the court below. 363 F. 2d, at 483.

actuarial methods were used to compute as a fixed dollar amount the "specific portion" as to which a qualifying power of appointment is given, where the power in fact granted extends to the whole corpus but the corpus is subject to measurable invasions for the benefit, for example, of a child, the result, in some cases, would be to enable substantial avoidance of estate tax. Whether, properly viewed, the Government's claim holds true, and, if so, what effect that should have upon the qualification of such a trust, is a difficult matter. Needless to say, nothing we hold in this opinion has reference to that quite different problem, which is not before us. Cf. *Gelb* v. *Commissioner, supra.*

The District Court used an annuity-valuation approach to compute the "specific portion." This was incorrect. The question, as the Court of Appeals recognized, is to determine the amount of the corpus required to produce the fixed monthly stipend, not to compute the present value of the right to monthly payments over an actuarially computed life expectancy. Accordingly, we reverse and remand for further proceedings in conformity with this opinion.

Reversed and remanded.

MR. JUSTICE STEWART, whom MR. JUSTICE BLACK and MR. JUSTICE HARLAN join, dissenting.

"Resolution of the question in this case, whether a qualifying 'specific portion' can be computed from the monthly stipend specified in a decedent's will, is," says the Court, "essentially a matter of discovering the intent of Congress." *Ante,* p. 219. Substituting "exclusively" for "essentially," I entirely agree with the Court's statement of the case. "The deduction was enacted in 1948, and the underlying purpose was to equalize the incidence of the estate tax in community property and common-law jurisdictions." *Ante,* p. 219. Again I agree. But I must

differ with the Court in its determination that the intent of Congress leads to the result the Court today reaches. For allowing the trust before us to qualify for the marital deduction will inevitably lead to the ironic and unjustified result of giving common-law jurisdictions more favorable tax treatment than community property States.

The Court holds that the widow in this case had an interest in "all the income from a specific portion" of the trust because the stream of payments to her could be capitalized by the use of assumed interest rates. This capitalized sum is then said to constitute the "specific portion" which qualifies for the marital deduction. A corollary of the Court's theory is that a trust which gave the widow the right to the income from a fixed amount (in dollars) of corpus and the right to appoint the entire corpus would support a marital deduction.[1] But if such a bequest qualifies, then one which limits her power of appointment to only that amount of corpus with respect to which she has income rights will also qualify for the marital deduction. For under the statute, the survivor must have only the right to "all the income from a specific portion . . . with power in the surviving spouse

[1] The only difference between a trust which gives the wife income from a fixed amount of corpus and the one the Court has before it today is that the former does not require capitalizing a stream of payments into a lump sum, since it defines the sum at the outset. Neither of these trusts would qualify for the marital deduction under current Treasury Regulations:

"*Definition of 'specific portion.'* A partial interest in property is not treated as a specific portion of the entire interest unless the rights of the surviving spouse . . . constitute a fractional or percentile share of a property interest so that such interest or share . . . reflects its proportionate share of the increment or decline in the whole of the property interest . . . . [I]f the annual income of the spouse is limited to a specific sum, or if she has a power to appoint only a specific sum out of a larger fund, the interest is not a deductible interest." Treas. Reg. § 20.2056 (b)–5 (c).

to appoint . . . *such* specific portion." [2] (Emphasis added.) The way in which such an estate allows a tax avoidance scheme not available to a community-property couple can be easily illustrated.

Assume a trust estate of $200,000, with the widow receiving the right to the income from $100,000 of its corpus and a power of appointment over that $100,000, and the children of the testator receiving income from the balance of the corpus during the widow's life, their remainders to vest when she dies. Now suppose that when the widow dies the trust corpus has doubled in value to $400,000. The wife's power of appointment over $100,000 applies only to make $100,000 taxable to her estate.[3] The remaining $300,000 passes tax free to the children. Contrast the situation in a community property State. The wife's 50% interest in the community property places $200,000 of the expanded assets in her estate and taxable as such; only $200,000, therefore, passes directly to the children. Thus, the Court's interpretation of "specific portion" affords common-law estates a significant tax advantage that community property dispositions cannot obtain.

By changing "specific portion" from the fractional share, which is both described in the Treasury Regulation and used as the basis for community property ownership, into a lump sum bearing no constant relation to the corpus, the Court allows capital appreciation to

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[2] The Court describes the "specific portion" over which the wife has a power of appointment as involving a "quite different problem" from the question directly before us today. *Ante*, p. 225. But unless it could be held that "such specific portion" does not refer to "a specific portion" (and I do not see how such a holding is possible), the way in which the Court defines "specific portion" with regard to the survivor's income rights will inevitably affect the meaning of "specific portion" with regard to the power of appointment.

[3] Section 2041 of the Internal Revenue Code of 1954.

be transferred from the wife's to the children's interest in the estate without any tax consequence. Thus, today's decision is directly opposed to what we have previously recognized as the purpose of the marital deduction:

> "The purpose . . . is only to permit a married couple's property to be taxed in two stages and not to allow a tax-exempt transfer of wealth into succeeding generations. Thus the marital deduction is generally restricted to the transfer of property interests that will be includible in the surviving spouse's gross estate." *United States* v. *Stapf*, 375 U. S. 118, 128.

The reference in the legislative history of the 1948 Act to the wife's "virtual owner[ship]" of the interest qualifying for the deduction is explained by the purpose discerned in *Stapf, supra.*[4] For only if she is the "virtual owner," will the wife's interest appreciate with the rest of the trust. Similarly, the congressional committee reports, in limiting their examples of "specific portions" to fractional shares, manifest an understanding that no tax avoidance was to be allowed via the marital deduction.[5] In no other manner could Congress have "equalize[d] the incidence of the estate tax in community property and common-law jurisdictions," as the Court so aptly puts it.

In ruling as it does today the Court not only frustrates the basic purposes of the marital deduction, it also ignores or brushes aside guideposts for deciding tax cases that have been carefully established in prior decisions of this Court. Thus, a 10-year-old interpretation of the statute contained in the Treasury Regulations is held invalid, although we have consistently given great weight

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[4] S. Rep. No. 1013, 80th Cong., 2d Sess., pt. 2, p. 16 (1948).

[5] H. R. Rep. No. 1337, 83d Cong., 2d Sess., p. A319 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess., p. 475 (1954).

to those regulations in the interpretation of tax statutes. See, *e. g., United States* v. *Stapf,* 375 U. S. 118, 127, n. 11.

Of even greater importance is the sharp change of attitude toward the marital deduction which today's decision heralds. The Treasury's interpretation of "specific portion" is held invalid because "Congress' intent [was] to afford a liberal 'estate-splitting' possibility." This finding of "liberalism" in the marital deduction leads the Court to reason that "[p]lainly such a provision should not be construed so as to impose unwarranted restrictions upon the availability of the deduction." *Ante,* p. 221. But we have previously construed the marital deduction to mean what it says and have not discerned a liberal intent that allows us to write new words into the statute, as the Court does here in changing "specific portion" to "ascertainable amount." For example, in *Jackson* v. *United States,* 376 U. S. 503, 510, eight members of the Court, speaking through MR. JUSTICE WHITE, declared that "the marital deduction . . . was knowingly hedged with limitations" by Congress, and "[t]o the extent it was thought desirable to modify the rigors of [such limitations], exceptions . . . were written into the Code." Thus, the lesson announced in *Jackson,* but ignored today, was that "[c]ourts should hesitate to provide [other exceptions] by straying so far from the statutory language." Cf. *Meyer* v. *United States,* 364 U. S. 410. One looks in vain through the *Jackson, Meyer,* and *Stapf* opinions, *supra,* for the roots of the liberalism which the Court today finds bursting forth from the marital deduction.

With this change in approach, uncertainty is now introduced into one of the areas of the law where long-range reliance upon the meaning of a statute is essential. Estate planners and tax lawyers are technicians schooled to view the marital deduction as a tightly drawn, precise provision. They are now shown a totally new statute

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that is to be construed in the manner of a workman's compensation act. See *Jackson* v. *Lykes Bros. S. S. Co.*, 386 U. S. 731. Such a construction will hardly promote "[t]he achievement of the purposes of the marital deduction [which] is dependent to a great degree upon the careful drafting of wills." *Jackson* v. *United States*, 376 U. S., at 511.

Believing today's decision to be at odds with the statutory purpose and the consistent interpretation of the marital deduction, I respectfully dissent.

HOFFA ET AL. *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 1003. Decided May 22, 1967.

Petitioners were convicted of various counts under an indictment charging mail and wire fraud and conspiracy, involving the defrauding of a union pension fund to rehabilitate Sun Valley, Inc., an enterprise in which certain petitioners had interests. The Solicitor General has advised that: six months after the indictment a conversation between petitioner Burris and one Sigelbaum was overheard by FBI agents through electronic eavesdropping; the conversation concerned the proposed transfer to Sigelbaum of Burris' interest in Sun Valley, and the conduct of the defense to this prosecution; the information was not introduced into evidence or used as an investigative lead; it was only peripherally relevant to the charges and was partly known through Burris' statements to government attorneys. *Held:* Since there was apparently no direct intrusion into attorney-client discussions, there is now no adequate justification to require a new trial for Burris or any other petitioner. The case is remanded to the District Court for a hearing, findings, and conclusions on the nature and relevance to all these convictions of the recorded conversation, and of any other conversations that may be shown to have been similarly overheard. *United States* v. *Shotwell Mfg. Co.*, 355 U. S. 233.

Certiorari granted; 367 F. 2d 698, vacated and remanded.

Maurice J. Walsh, Morris A. Shenker, Joseph A. Fanelli, Frank Ragano, George F. Callaghan, Richard E. Gorman, Jacques M. Schiffer and *Charles A. Bellows* for petitioners.

Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg and *Jerome M. Feit* for the United States.

PER CURIAM.

Petitioners were convicted of various counts under a 28-count indictment charging mail and wire fraud, in violation of 18 U. S. C. §§ 1341, 1343, and conspiracy,

in violation of 18 U. S. C. § 371. The United States claimed, and the jury apparently found, that petitioners conspired to defraud, and did defraud, the Central States, Southeast and Southwest Areas Pension Fund of the International Brotherhood of Teamsters, with the prime objective of financially rehabilitating Sun Valley, Inc., a real estate enterprise in which certain of the petitioners had important interests. For reasons which follow, we do not reach, one way or the other, any of the contentions urged by petitioners in support of their petition for a writ of certiorari.

In response to the petition, the Solicitor General *sua sponte* has advised the Court that on December 2, 1963, some six months after the indictment in this case, a conversation between petitioner Burris and one Benjamin Sigelbaum, not a defendant in this prosecution, was overheard by agents of the Federal Bureau of Investigation as a result of electronic eavesdropping. The eavesdropping equipment had been installed in Sigelbaum's office, by trespass, some 12 months before this conversation, and thereafter had been maintained in operation. We are informed by the Solicitor General that the recorded conversation was concerned both with the proposed transfer to Sigelbaum of Burris' interest in Sun Valley, and with the conduct of the defense to this prosecution. The Solicitor General has indicated that the contents of the recording were available to government attorneys involved in this prosecution, but adds that the recording was only "peripherally relevant to the charges underlying [Burris'] conviction."* We are, moreover, advised by him that the information obtained through this electronic eavesdropping was not introduced into evidence at trial, that it was never the basis of any investigative lead, and that it was in part already

*Brief for the United States in Opposition 70.

known, through Burris' own statements, to government attorneys. Unlike the situations in *Black* v. *United States,* 385 U. S. 26, and *O'Brien* v. *United States,* 386 U. S. 345, there was apparently no direct intrusion here into attorney-client discussions. In these circumstances, we find no "adequate justification," *Black* v. *United States, supra,* at 29, now to require a new trial of Burris or of any of the other petitioners; the more orderly and appropriate procedure is instead to remand the case to the District Court for a hearing, findings, and conclusions on the nature and relevance to these convictions of the recorded conversation, and of any other conversations that may be shown to have been overheard through similar eavesdropping. *United States* v. *Shotwell Mfg. Co.,* 355 U. S. 233.

We do not accept the Solicitor General's suggestion that such an inquiry should be confined to the conviction of Burris. We consider it more appropriate that each of these petitioners be provided an opportunity to establish, if he can, that the interception of this particular conversation, or of other conversations, vitiated in some manner his conviction. We do not intend by this to suggest that any or all of the petitioners might, under the circumstances described by the Solicitor General, be entitled to a new trial; we decide only that further proceedings must be held, and findings and conclusions made, to determine the content and pertinence to this case of any such recorded conversations.

Accordingly, we grant the petition for a writ of certiorari as to each of the petitioners, vacate the judgment of the Court of Appeals, and remand the case to the District Court for further proceedings. In such proceedings, the District Court will confine the evidence presented by both sides to that which is material to questions of the content of this and any other electronically eavesdropped conversations, and of the relevance of any such

conversations to petitioners' subsequent convictions. The District Court will make such findings of fact on these questions as may be appropriate in light of the further evidence and of the entire existing record. If the District Court decides, on the basis of such findings, that the conviction of any of the petitioners was not tainted by the use of evidence thus improperly obtained, it will enter new final judgments as to such petitioners based on the existing record as supplemented by its further findings, thereby preserving to all affected parties the right to seek further appropriate appellate review. If, on the other hand, the District Court concludes after such further proceedings that the conviction of any of the petitioners was tainted, it would then become its duty to accord any such petitioner a new trial. See *United States* v. *Shotwell Mfg. Co., supra,* at 245–246; see also *Shotwell Mfg. Co.* v. *United States,* 371 U. S. 341.

The petition for a writ of certiorari is granted, the judgment of the Court of Appeals is vacated, and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK would grant certiorari and set the case for argument. He dissents from the vacation of the judgment of the Court of Appeals and from the remand of the case to the District Court.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

KRAKOFF, ADMINISTRATOR *v.* WEAVER ET AL.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 1174. Decided May 22, 1967.

Appeal dismissed and certiorari denied.

Thelma C. Furry for appellant.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

TENNESSEE EX REL. NEW PROVIDENCE UTILITY DISTRICT ET AL. *v.* CITY OF CLARKSVILLE ET AL.

APPEAL FROM THE SUPREME COURT OF TENNESSEE.

No. 1182. Decided May 22, 1967.

Appeal dismissed and certiorari denied.

W. Raymond Denney and *Stanley M. Chernau* for appellants.

Edwin F. Hunt for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

WALKER *v.* WAINWRIGHT, CORRECTIONS DIRECTOR.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 354, Misc. Decided May 22, 1967.

Certiorari granted; vacated and remanded.

Petitioner *pro se.*

Earl Faircloth, Attorney General of Florida, and ***Stanley D. Kupiszewski, Jr.,*** Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Florida for further consideration in light of *Anders* v. *California,* 386 U. S. 738.

MR. JUSTICE BLACK, MR. JUSTICE HARLAN, and MR. JUSTICE STEWART are of the opinion that certiorari should be denied.

CHEWIE *v.* LOCK, COUNTY ATTORNEY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA.

No. 1530, Misc. Decided May 22, 1967.

261 F. Supp. 830, appeal dismissed.

PER CURIAM.

The appeal is dismissed for want of jurisdiction.

MASCUILLI, ADMINISTRATRIX *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 274. Decided May 22, 1967.

Certiorari granted; 358 F. 2d 133, reversed.

Abraham E. Freedman, Milton M. Borowsky and *Martin J. Vigderman* for petitioner.

Solicitor General Marshall, Assistant Attorney General Douglas and *Alan S. Rosenthal* for the United States.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment is reversed. *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96; *Crumady* v. *The Joachim Hendrik Fisser*, 358 U. S. 423.

MR. JUSTICE HARLAN, MR. JUSTICE STEWART, and MR. JUSTICE WHITE are of the opinion that certiorari should be denied.

UNITED STATES *v.* MARSHALL & ILSLEY BANK STOCK CORP. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN.

No. 1017. Decided May 22, 1967.

255 F. Supp. 273, reversed.

Solicitor General Marshall, Assistant Attorney General Turner, Nathan Lewin, Howard E. Shapiro and *Herbert G. Schoepke* for the United States.

Maxwell H. Herriott and *Louis Quarles* for appellees.

PER CURIAM.

The judgment is reversed. Section 11 (e) of the Bank Holding Company Act of 1956, as amended, 80 Stat. 241; *United States* v. *First City National Bank of Houston*, 386 U. S. 361.

JULIAN MESSNER, INC., ET AL. *v.* SPAHN.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 1154. Decided May 22, 1967.

18 N. Y. 2d 324, 221 N. E. 2d 543, vacated and remanded.

Selig J. Levitan for appellants.

Arthur K. Radin for appellee.

Irwin Karp for Authors League of America, Inc., as *amicus curiae.*

PER CURIAM.

The motion of the Authors League of America, Inc., for leave to file a brief, as *amicus curiae,* is granted.

The judgment is vacated and the case is remanded to the Court of Appeals of New York for further consideration in light of *Time, Inc.* v. *Hill,* 385 U. S. 374.

THE CHIEF JUSTICE and MR. JUSTICE FORTAS would dismiss the appeal for want of a substantial federal question.

GREENE *v.* TEXAS.

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 1199. Decided May 22, 1967.

406 S. W. 2d 465, appeal dismissed and certiorari denied.

Buck C. Miller for appellant.

Crawford C. Martin, Attorney General of Texas, *George M. Cowden*, First Assistant Attorney General, *R. L. Lattimore*, *Howard M. Fender*, *Robert E. Owen* and *Lonny F. Zwiener*, Assistant Attorneys General, and *A. J. Carubbi, Jr.*, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

BELCHER *v.* WISCONSIN.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN.

No. 24, Misc. Decided May 22, 1967.

Certiorari granted; vacated and remanded.

Petitioner *pro se.*

Bronson C. La Follette, Attorney General of Wisconsin, and *William A. Platz* and *Warren H. Resh,* Assistant Attorneys General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Wisconsin for further consideration in light of *Anders* v. *California,* 386 U. S. 738.

MR. JUSTICE BLACK, MR. JUSTICE HARLAN, and MR. JUSTICE STEWART are of the opinion that certiorari should be denied.

FRAZIER *v.* LANE, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 33, Misc. Decided May 22, 1967.

Certiorari granted; vacated and remanded.

Petitioner *pro se.*

John J. Dillon, Attorney General of Indiana, and *Douglas B. McFadden,* Deputy Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *Long* v. *District Court of Iowa in and for Lee County,* 385 U. S. 192.

BARNETT *v.* NEVADA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA.

No. 48, Misc. Decided May 22, 1967.

Certiorari granted; vacated and remanded.

Petitioner *pro se.*

Harvey Dickerson, Attorney General of Nevada, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Nevada for further consideration in light of *Anders* v. *California,* 386 U. S. 738, and *Long* v. *District Court of Iowa in and for Lee County,* 385 U. S. 192.

FEDERAL TRADE COMMISSION *v.* UNIVERSAL-RUNDLE CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 101. Argued March 13, 1967.—Decided May 29, 1967.

After hearings on a complaint charging respondent with violations of the price discrimination provisions of the Clayton Act, § 2 (a) as amended, the Federal Trade Commission (FTC) found that the 10% truckload discounts offered by respondent on its line of plumbing fixtures had a proscribed anticompetitive effect since some customers who were unable to purchase in truckload quantities were in competition with customers able to take advantage of the discount. Accordingly, the Commission issued a cease-and-desist order prohibiting respondent from discriminating in price between competing customers. Thereafter, respondent petitioned the Commission for a stay of the order pending investigation of alleged industry-wide discount practices, claiming that enforcement against it alone would cause it substantial financial injury. The FTC denied the petition. On petition for review, the Court of Appeals set aside the denial and remanded the cause for the industry investigation sought by respondent. *Held:* Since the Commission's refusal to withhold enforcement of the cease-and-desist order did not constitute a patent abuse of discretion, the Court of Appeals exceeded its authority by setting aside the Commission's denial of the petition for a stay. *Moog Industries* v. *Federal Trade Commission*, 355 U. S. 411 (1958), followed. Pp. 249–252.

352 F. 2d 831, reversed and remanded.

Robert S. Rifkind argued the cause for petitioner. With him on the briefs were *Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Milton J. Grossman, James McI. Henderson* and *W. Risque Harper.*

Frank C. McAleer argued the cause for respondent. With him on the brief was *James R. Fruchterman.*

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

The question presented by this case is whether the Court of Appeals exceeded its authority as a reviewing court by postponing the operation of a Federal Trade Commission cease-and-desist order against respondent until an investigation should be made of alleged industry-wide violations of the price discrimination provisions of the Clayton Act, § 2, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13.

Respondent Universal-Rundle produces a full line of china and cast-iron plumbing fixtures which it sells to customers located throughout the United States. In 1960, the Federal Trade Commission issued a complaint charging that for more than three years Universal-Rundle's sales to some of these customers had been made "at substantially higher prices than the prices at which respondent sells such products of like grade and quality to other purchasers, some of whom are engaged in competition with the less favored purchasers in the resale of such products." The effect of the discriminations, the complaint alleged, "may be substantially to lessen competition" in violation of § 2 (a) of the Clayton Act, as amended. In its answer, Universal-Rundle denied the essential allegations of the complaint, and, in addition, asserted as affirmative defenses that such price differentials as may have existed were cost justified or were made "in good faith to meet competition."

After evidentiary hearings, in which Universal-Rundle made no effort to sustain its affirmative defenses, the Commission found that during 1957 Universal-Rundle had offered "truckload discounts" averaging approximately 10% to all of its customers. Because some of these customers could not afford to purchase in truckload quantities, and thus were unable to avail them-

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selves of the discounts, the Commission held that the offering of the truckload discounts constituted price discrimination within the meaning of § 2 (a) of the Clayton Act, as amended. Since some Universal-Rundle customers who were able to purchase in truckload quantities were found to be in competition with customers unable to take advantage of the discounts, the Commission concluded that Universal-Rundle's price discrimination had the anticompetitive effect proscribed by § 2 (a).[1] Accordingly, it ordered Universal-Rundle to refrain from:

> "Discriminating in price by selling 'Universal-Rundle' brand or Universal-Rundle manufactured plumbing fixtures . . . of like grade and quality to any purchaser at prices higher than those granted any other purchaser, where such other purchaser competes in fact with the unfavored purchaser in the resale or distribution of such products."

At no time during the four years in which the complaint was pending did Universal-Rundle offer the Commission any information as to its competitors' pricing practices or suggest that industry-wide proceedings might be appropriate. But one month after the issuance of the cease-and-desist order, Universal-Rundle petitioned the Commission to stay its cease-and-desist order for a time sufficient "to investigate and institute whatever proceedings are deemed appropriate by the Commission to correct the industry-wide practice by plumbing fixture manufacturers of granting discounts in prices on truckload shipments." In support of its petition, Universal-Rundle submitted affidavits and documents tending to show: (1) that its principal competitors were offering truckload discounts averaging approximately 18%; (2) that

[1] The Commission's opinion is reported in Trade Reg. Rep., 1963–1965 Transfer Binder, ¶ 16,948.

Universal-Rundle's share of the plumbing fixture market, exclusive of its sales to Sears, Roebuck and Co., was 5.75% whereas the five leading plumbing manufacturing concerns enjoyed market shares of 6 to 32%; [2] and (3) that each of these five competitors had reported profits within the preceding two years whereas Universal-Rundle had sustained substantial losses during each of the preceding three years. In addition, Universal-Rundle submitted an affidavit in which its marketing vice president declared on information and belief that some of Universal-Rundle's competitors were selling to customers who "may not purchase in truckload quantities." The vice president further averred:

> "That based upon his knowledge of the competitive conditions in this industry, if respondent is not permitted to sell plumbing fixtures with a differential in price as are its competitors on truckload and less than truckload quantities, respondent's sales of plumbing fixtures under the 'U/R' brand will be substantially decreased and lost to its competitors, who continue to offer substantial discounts on truckload shipments. And he is of the further belief [that] the Company may suffer further substantial financial losses if it must be the sole plumbing fixture manufacturer under an order to cease and desist."

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[2] According to respondent's petition for a stay, the shares enjoyed by its principal competitors were:

	Percent
American Radiator & Standard Sanitary Corp.....	32
Kohler Co.....	15
Eljer Division of the Murray Corp. of America.....	10
Crane Co.....	9
Briggs Manufacturing Co.....	6
Rheem Manufacturing Co.....	5

In a unanimous decision denying the petition for the stay, the Commission held that a general allegation that competitors were offering truckload discounts was not a sufficient basis for instituting industry-wide proceedings or for withholding enforcement of the cease-and-desist order. Noting that respondent's petition appeared to be premised on the contention that truckload discounts had been held to be *per se* illegal, the Commission wrote, "There is nothing in our decision to support this contention, . . . nor does the order to cease and desist entered against respondent absolutely prohibit it from granting truckload discounts." While the granting of such discounts may result in price discriminations having proscribed anticompetitive effects, "the practice is not necessarily illegal as indicated in respondent's petition." In each case, it must be determined:

> "whether the discount creates a price difference, whether the recipient of such a discount is competing at the same functional level with a customer paying a higher price, whether the customer buying in less than truckload quantities is able to avail itself of the truckload discount, and whether the differential is sufficient in the competitive conditions shown to exist to have the requisite anticompetitive effects." [3]

"Moreover," the Commission wrote, "the fact that respondent may have incurred losses prior to the issuance of the order does not support the contention that enforcement of the order will cause it financial hardship." [4]

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[3] The Commission further noted that "even if a prima facie violation of Section 2 (a) is established, the seller may in each case interpose the statutory defenses to justify the discrimination." Trade Reg. Rep., 1963–1965 Transfer Binder, ¶ 16,998, at 22,070.

[4] *Ibid.*

Following denial of its petition for a stay, Universal-Rundle instituted review proceedings in the Court of Appeals for the Seventh Circuit. Without reaching the merits of the petition to set aside the cease-and-desist order, the court below set aside the Commission's order denying the stay and remanded the cause with instructions that the Commission conduct an industry investigation. 352 F. 2d 831 (1965). The court conceded that under *Moog Industries* v. *Federal Trade Commission,* 355 U. S. 411 (1958), the Federal Trade Commission's discretionary determination to refuse to stay a cease-and-desist order "should not be overturned in the absence of a patent abuse of discretion." 355 U. S., at 414. But it considered that Universal-Rundle's evidentiary offering was sufficient to demonstrate that the refusal to grant the requested stay constituted a patent abuse of discretion. The premises upon which the court below based its conclusion may be briefly restated: (1) "[i]t is apparent," the court wrote with reference to the evidentiary offering, "that the Commission has directed its attack against a general practice which is prevalent in the industry"; (2) enforcement would lead to the "sacrifice" of one of the "smallest participants" in the industry; and, consequently, (3) approval of the enforcement sanctions would be contrary to the purposes of the Clayton Act since "the giants in the field would be the real benefactors—not the public."

In *Moog Industries* v. *Federal Trade Commission, supra,* we set forth the principles which must govern our review of the action taken by the court below: The decision as to whether to postpone enforcement of a cease-and-desist order "depends on a variety of factors peculiarly within the expert understanding of the Commission." 355 U. S., at 413. Thus, "although an alleg-

edly illegal practice may appear to be operative throughout an industry, whether such appearances reflect fact" is a question "that call[s] for discretionary determination by the administrative agency." *Ibid.* Because these determinations require the specialized experienced judgment of the Commission, they cannot be overturned by the courts "in the absence of a patent abuse of discretion." 355 U. S., at 414. Consequently, the reviewing court's inquiry is not whether the evidence adduced in support of a petition for a stay tends to establish certain facts, such as that the industry is engaged in allegedly illegal price discrimination practices; rather, the court's review must be limited to determining whether the Commission's evaluation of the merit of the petition for a stay was patently arbitrary and capricious.

Viewed in the light of these principles, the decision below must be reversed. The evidence which Universal-Rundle offered in its petition for a stay is so inconclusive that it cannot be said that the Commission's evaluation of the evidence, and its consequent refusal to grant the stay, constituted a patent abuse of discretion. Indeed, Universal-Rundle's evidence does not even support the improper *de novo* findings which formed the basis for the Court of Appeals' decision. Universal-Rundle's truckload discounts were held to be illegal only because the corporation sold fixtures to one group of customers who were unable to purchase in truckload quantities while simultaneously selling fixtures at a discount to another group of customers who were in competition with the nonfavored group. Since the evidence presented in the petition for a stay did not tend to show that the discounts offered by Universal-Rundle's competitors had such an anticompetitive effect, there was no basis for a conclusion that the practice held illegal by the Commission was prevalent throughout the plumb-

ing industry. Similarly, the unsupported speculation of Universal-Rundle's vice president as to the pecuniary effect of enforcement of the cease-and-desist order does not provide a sufficient basis for a finding that Universal-Rundle would be "sacrificed" or even that it would suffer substantial financial injury. It follows that Universal-Rundle has failed to demonstrate that enforcement would be contrary to the purposes of the Clayton Act.

We note that even if a petitioner succeeded in demonstrating to the Commission that all of its competitors were engaged in illegal price-discrimination practices identical to its own, and that enforcement of a cease-and-desist order might cause it substantial financial injury, the Commission would not necessarily be obliged to withhold enforcement of the order. As we stated in *Moog Industries*, 355 U. S., at 413:

> "It is clearly within the special competence of the Commission to appraise the adverse effect on competition that might result from postponing a particular order prohibiting continued violations of the law. Furthermore, the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically."

On the other hand, as the *Moog Industries* case also indicates, the Federal Trade Commission does not have unbridled power to institute proceedings which will arbitrarily destroy one of many law violators in an industry. This is not such a case. The Commission's refusal to withhold enforcement of the cease-and-desist order against respondent was based upon a reasonable evaluation of the merits of the petition for a stay; thus it was

not within the scope of the reviewing authority of the court below to overthrow the Commission's determination. Consequently, we reverse the judgment below, set aside the stay, and remand the cause for further proceedings consistent with this opinion.[5]

It is so ordered.

[5] We are informed by the parties that after the Commission's refusal to grant the stay, the respondent presented some evidence to the Commission staff which was relevant to the anticompetitive effects of the discounts offered by two of its competitors. Apparently relying on this evidence, the court below ruled that the Commission was obliged to conduct its own industry investigation and that the pendency of a Department of Justice antitrust investigation of the industry did not relieve the Commission of this responsibility. Since the post-proceeding evidence was not properly before the court below on a petition for review and is not in the record here, we do not reach, and the court below should not have reached, the questions of whether an industry investigation was necessitated by the additional evidence or whether such an investigation would be unnecessary in light of the Department of Justice investigation.

AFROYIM *v.* RUSK, SECRETARY OF STATE.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 456. Argued February 20, 1967.—Decided May 29, 1967.

Petitioner, of Polish birth, became a naturalized American citizen in 1926. He went to Israel in 1950 and in 1951 voted in an Israeli legislative election. The State Department subsequently refused to renew his passport, maintaining that petitioner had lost his citizenship by virtue of § 401 (e) of the Nationality Act of 1940 which provides that a United States citizen shall "lose" his citizenship if he votes in a foreign political election. Petitioner then brought this declaratory judgment action alleging the unconstitutionality of § 401 (e). On the basis of *Perez* v. *Brownell*, 356 U. S. 44, the District Court and Court of Appeals held that Congress under its implied power to regulate foreign affairs can strip an American citizen of his citizenship. *Held:* Congress has no power under the Constitution to divest a person of his United States citizenship absent his voluntary renunciation thereof. *Perez* v. *Brownell, supra,* overruled. Pp. 256–268.

(a) Congress has no express power under the Constitution to strip a person of citizenship, and no such power can be sustained as an implied attribute of sovereignty, as was recognized by Congress before the passage of the Fourteenth Amendment; and a mature and well-considered dictum in *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 827, is to the same effect. Pp. 257–261.

(b) The Fourteenth Amendment's provision that "All persons born or naturalized in the United States . . . are citizens of the United States . . ." completely controls the status of citizenship and prevents the cancellation of petitioner's citizenship. Pp. 262–268.

361 F. 2d 102, reversed.

Edward J. Ennis argued the cause for petitioner. On the briefs was *Nanette Dembitz.*

Charles Gordon argued the cause for respondent. On the brief were *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner, born in Poland in 1893, immigrated to this country in 1912 and became a naturalized American citizen in 1926. He went to Israel in 1950, and in 1951 he voluntarily voted in an election for the Israeli Knesset, the legislative body of Israel. In 1960, when he applied for renewal of his United States passport, the Department of State refused to grant it on the sole ground that he had lost his American citizenship by virtue of § 401 (e) of the Nationality Act of 1940 which provides that a United States citizen shall "lose" his citizenship if he votes "in a political election in a foreign state." [1] Petitioner then brought this declaratory judgment action in federal district court alleging that § 401 (e) violates both the Due Process Clause of the Fifth Amendment and § 1, cl. 1, of the Fourteenth Amendment [2] which grants American citizenship to persons like petitioner. Because neither the Fourteenth Amendment nor any other provision of the Constitution expressly grants Congress the power to

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[1] 54 Stat. 1168, as amended, 58 Stat. 746, 8 U. S. C. § 801 (1946 ed.):

"A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

. . . . . .

"(e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory."

This provision was re-enacted as § 349 (a)(5) of the Immigration and Nationality Act of 1952, 66 Stat. 267, 8 U. S. C. § 1481 (a)(5).

[2] "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States . . . ."

take away that citizenship once it has been acquired, petitioner contended that the only way he could lose his citizenship was by his own voluntary renunciation of it. Since the Government took the position that § 401 (e) empowers it to terminate citizenship without the citizen's voluntary renunciation, petitioner argued that this section is prohibited by the Constitution. The District Court and the Court of Appeals, rejecting this argument, held that Congress has constitutional authority forcibly to take away citizenship for voting in a foreign country based on its implied power to regulate foreign affairs. Consequently, petitioner was held to have lost his American citizenship regardless of his intention not to give it up. This is precisely what this Court held in *Perez* v. *Brownell,* 356 U. S. 44.

Petitioner, relying on the same contentions about voluntary renunciation of citizenship which this Court rejected in upholding § 401 (e) in *Perez,* urges us to reconsider that case, adopt the view of the minority there, and overrule it. That case, decided by a 5–4 vote almost 10 years ago, has been a source of controversy and confusion ever since, as was emphatically recognized in the opinions of all the judges who participated in this case below.[3] Moreover, in the other cases decided with [4] and since [5] *Perez,* this Court has consistently invalidated on a case-by-case basis various other statutory sections providing for involuntary expatriation. It has done so on various grounds and has refused to hold that citizens can be expatriated without their voluntary renunciation of

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[3] 250 F. Supp. 686; 361 F. 2d 102, 105.

[4] *Trop* v. *Dulles,* 356 U. S. 86; *Nishikawa* v. *Dulles,* 356 U. S. 129.

[5] *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144; *Schneider* v. *Rusk,* 377 U. S. 163. In his concurring opinion in *Mendoza-Martinez,* MR. JUSTICE BRENNAN expressed "felt doubts of the correctness of *Perez* . . . ." 372 U. S., at 187.

citizenship. These cases, as well as many commentators,[6] have cast great doubt upon the soundness of *Perez*. Under these circumstances, we granted certiorari to reconsider it, 385 U. S. 917. In view of the many recent opinions and dissents comprehensively discussing all the issues involved,[7] we deem it unnecessary to treat this subject at great length.

The fundamental issue before this Court here, as it was in *Perez*, is whether Congress can consistently with the Fourteenth Amendment enact a law stripping an American of his citizenship which he has never voluntarily renounced or given up. The majority in *Perez* held that Congress could do this because withdrawal of citizenship is "reasonably calculated to effect the end that is within the power of Congress to achieve." 356 U. S., at 60. That conclusion was reached by this chain of reasoning: Congress has an implied power to deal with foreign affairs as an indispensable attribute of sovereignty; this implied power, plus the Necessary and Proper Clause, empowers Congress to regulate voting by American citizens in foreign elections; involuntary expatriation is within the "ample scope" of "appropriate modes" Congress can adopt to effectuate its general regulatory power. *Id.*, at

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[6] See, *e. g.*, Agata, Involuntary Expatriation and *Schneider* v. *Rusk*, 27 U. Pitt. L. Rev. 1 (1965); Hurst, Can Congress Take Away Citizenship?, 29 Rocky Mt. L. Rev. 62 (1956); Kurland, Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government," 78 Harv. L. Rev. 143, 169–175 (1964); Comment, 56 Mich. L. Rev. 1142 (1958); Note, Forfeiture of Citizenship Through Congressional Enactments, 21 U. Cin. L. Rev. 59 (1952); 40 Cornell L. Q. 365 (1955); 25 S. Cal. L. Rev. 196 (1952). But see, *e. g.*, Comment, The Expatriation Act of 1954, 64 Yale L. J. 1164 (1955).

[7] See *Perez* v. *Brownell*, *supra*, at 62 (dissenting opinion of THE CHIEF JUSTICE), 79 (dissenting opinion of MR. JUSTICE DOUGLAS); *Trop* v. *Dulles*, *supra*, at 91–93 (part I of opinion of Court); *Nishikawa* v. *Dulles*, *supra*, at 138 (concurring opinion of MR. JUSTICE BLACK).

57–60. Then, upon summarily concluding that "there is nothing in the . . . Fourteenth Amendment to warrant drawing from it a restriction upon the power otherwise possessed by Congress to withdraw citizenship," *id.*, at 58, n. 3, the majority specifically rejected the "notion that the power of Congress to terminate citizenship depends upon the citizen's assent," *id.*, at 61.

First we reject the idea expressed in *Perez* that, aside from the Fourteenth Amendment, Congress has any general power, express or implied, to take away an American citizen's citizenship without his assent. This power cannot, as *Perez* indicated, be sustained as an implied attribute of sovereignty possessed by all nations. Other nations are governed by their own constitutions, if any, and we can draw no support from theirs. In our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship. Our Constitution governs us and we must never forget that our Constitution limits the Government to those powers specifically granted or those that are necessary and proper to carry out the specifically granted ones. The Constitution, of course, grants Congress no express power to strip people of their citizenship, whether in the exercise of the implied power to regulate foreign affairs or in the exercise of any specifically granted power. And even before the adoption of the Fourteenth Amendment, views were expressed in Congress and by this Court that under the Constitution the Government was granted no power, even under its express power to pass a uniform rule of naturalization, to determine what conduct should and should not result in the loss of citizenship. On three occasions, in 1794, 1797, and 1818, Congress considered and rejected proposals to enact laws which would describe certain conduct as resulting in expatriation.[8] On each occa-

[8] For a history of the early American view of the right of expatriation, including these congressional proposals, see generally

sion Congress was considering bills that were concerned with recognizing the right of voluntary expatriation and with providing some means of exercising that right. In 1794 and 1797, many members of Congress still adhered to the English doctrine of perpetual allegiance and doubted whether a citizen could even voluntarily renounce his citizenship.[9] By 1818, however, almost no one doubted the existence of the right of voluntary expatriation, but several judicial decisions had indicated that the right could not be exercised by the citizen without the consent of the Federal Government in the form of enabling legislation.[10] Therefore, a bill was introduced to provide that a person could voluntarily relinquish his citizenship by declaring such relinquishment in writing before a district court and then departing from the country.[11] The opponents of the bill argued that Congress had no constitutional authority, either express or implied, under either the Naturalization Clause or the Necessary and Proper Clause, to provide that a certain act would constitute expatriation.[12] They pointed to a proposed Thirteenth

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Roche, The Early Development of United States Citizenship (1949); Tsiang, The Question of Expatriation in America Prior to 1907 (1942); Dutcher, The Right of Expatriation, 11 Am. L. Rev. 447 (1877); Roche, The Loss of American Nationality—The Development of Statutory Expatriation, 99 U. Pa. L. Rev. 25 (1950); Slaymaker, The Right of the American Citizen to Expatriate, 37 Am. L. Rev. 191 (1903).

[9] 4 Annals of Cong. 1005, 1027–1030 (1794); 7 Annals of Cong. 349 *et seq.* (1797).

[10] See, *e. g.*, *Talbot* v. *Janson*, 3 Dall. 133.

[11] 31 Annals of Cong. 495 (1817).

[12] *Id.*, at 1036–1037, 1058 (1818). Although some of the opponents, believing that citizenship was derived from the States, argued that any power to prescribe the mode for its relinquishment rested in the States, they were careful to point out that "the absence of all power from the State Legislatures would not vest it in us." *Id.*, at 1039.

Amendment, subsequently not ratified, which would have provided that a person would lose his citizenship by accepting an office or emolument from a foreign government.[13] Congressman Anderson of Kentucky argued:

> "The introduction of this article declares the opinion . . . that Congress could not declare the acts which should amount to a renunciation of citizenship; otherwise there would have been no necessity for this last resort. When it was settled that Congress could not declare that the acceptance of a pension or an office from a foreign Emperor amounted to a disfranchisement of the citizen, it must surely be conceded that they could not declare that any other act did. The cases to which their powers before this amendment confessedly did not extend, are very strong, and induce a belief that Congress could not in any case declare the acts which should cause 'a person to cease to be a citizen.' The want of power in a case like this, where the individual has given the strongest evidence of attachment to a foreign potentate and an entire renunciation of the feelings and principles of an American citizen, certainly establishes the absence of all power to pass a bill like the present one. Although the intention with which it was introduced, and the title of the bill declare that it is to insure and foster the right of the citizen, the direct and inevitable effect of the bill, is an assumption of power by Congress to declare that certain acts when committed shall amount to a renunciation of citizenship." 31 Annals of Cong. 1038–1039 (1818).

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[13] The amendment had been proposed by the 11th Cong., 2d Sess. See The Constitution of the United States of America, S. Doc. No. 39, 88th Cong., 1st Sess., 77–78 (1964).

Congressman Pindall of Virginia rejected the notion, later accepted by the majority in *Perez*, that the nature of sovereignty gives Congress a right to expatriate citizens:

> "[A]llegiance imports an obligation on the citizen or subject, the correlative right to which resides in the sovereign power: allegiance in this country is not due to Congress, but to the people, with whom the sovereign power is found; it is, therefore, by the people only that any alteration can be made of the existing institutions with respect to allegiance." *Id.*, at 1045.

Although he recognized that the bill merely sought to provide a means of voluntary expatriation, Congressman Lowndes of South Carolina argued:

> "But, if the Constitution had intended to give to Congress so delicate a power, it would have been expressly granted. That it was a delicate power, and ought not to be loosely inferred, . . . appeared in a strong light, when it was said, and could not be denied, that to determine the manner in which a citizen may relinquish his right of citizenship, is equivalent to determining how he shall be divested of that right. The effect of assuming the exercise of these powers will be, that by acts of Congress a man may not only be released from all the liabilities, but from all the privileges of a citizen. If you pass this bill, . . . you have only one step further to go, and say that such and such acts shall be considered as presumption of the intention of the citizen to expatriate, and thus take from him the privileges of a citizen. . . . [Q]uestions affecting the right of the citizen were questions to be regulated, not by the laws of the General or State Governments, but by Constitutional provisions. If there was anything

> essential to our notion of a Constitution, . . . it was this: that while the employment of the physical force of the country is in the hands of the Legislature, those rules which determine what constitutes the rights of the citizen, shall be a matter of Constitutional provision." *Id.*, at 1050–1051.

The bill was finally defeated.[14] It is in this setting that six years later, in *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 827, this Court, speaking through Chief Justice Marshall, declared in what appears to be a mature and well-considered dictum that Congress, once a person becomes a citizen, cannot deprive him of that status:

> "[The naturalized citizen] becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual."

Although these legislative and judicial statements may be regarded as inconclusive and must be considered in the historical context in which they were made,[15] any doubt

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[14] *Id.*, at 1071. It is interesting to note that the proponents of the bill, such as Congressman Cobb of Georgia, considered it to be "the simple declaration of the manner in which a voluntary act, in the exercise of a natural right, may be performed" and denied that it created or could lead to the creation of "a presumption of relinquishment of the right of citizenship." *Id.*, at 1068.

[15] The dissenting opinion here points to the fact that a Civil War Congress passed two Acts designed to deprive military deserters to the Southern side of the rights of citizenship. Measures of this kind passed in those days of emotional stress and hostility are by no means the most reliable criteria for determining what the Constitution means.

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as to whether prior to the passage of the Fourteenth Amendment Congress had the power to deprive a person against his will of citizenship once obtained should have been removed by the unequivocal terms of the Amendment itself. It provides its own constitutional rule in language calculated completely to control the status of citizenship: "All persons born or naturalized in the United States . . . are citizens of the United States . . . ." There is no indication in these words of a fleeting citizenship, good at the moment it is acquired but subject to destruction by the Government at any time. Rather the Amendment can most reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it. Once acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit.

It is true that the chief interest of the people in giving permanence and security to citizenship in the Fourteenth Amendment was the desire to protect Negroes. The *Dred Scott* decision, 19 How. 393, had shortly before greatly disturbed many people about the status of Negro citizenship. But the Civil Rights Act of 1866, 14 Stat. 27, had already attempted to confer citizenship on all persons born or naturalized in the United States. Nevertheless, when the Fourteenth Amendment passed the House without containing any definition of citizenship, the sponsors of the Amendment in the Senate insisted on inserting a constitutional definition and grant of citizenship. They expressed fears that the citizenship so recently conferred on Negroes by the Civil Rights Act could be just as easily taken away from them by subsequent Congresses, and it was to provide an insuperable obstacle against every governmental effort to strip Negroes of their newly acquired citizenship that the first clause was added to the Fourteenth Amend-

ment.[16] Senator Howard, who sponsored the Amendment in the Senate, thus explained the purpose of the clause:

> "It settles the great question of citizenship and removes all doubt as to what persons are or are not citizens of the United States. . . . We desired to put this question of citizenship and the rights of citizens . . . under the civil rights bill beyond the legislative power . . . ." Cong. Globe, 39th Cong., 1st Sess., 2890, 2896 (1866).

This undeniable purpose of the Fourteenth Amendment to make citizenship of Negroes permanent and secure would be frustrated by holding that the Government can rob a citizen of his citizenship without his consent by simply proceeding to act under an implied general power to regulate foreign affairs or some other power generally granted. Though the framers of the Amendment were not particularly concerned with the problem of expatriation, it seems undeniable from the language they used that they wanted to put citizenship beyond the power of any governmental unit to destroy. In 1868, two years after the Fourteenth Amendment had been proposed, Congress specifically considered the subject of expatriation. Several bills were introduced to impose involuntary expatriation on citizens who committed certain acts.[17] With little

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[16] Cong. Globe, 39th Cong., 1st Sess., 2768–2769, 2869, 2890 *et seq.* (1866). See generally, Flack, Adoption of the Fourteenth Amendment 88–94 (1908).

[17] Representative Jenckes of Rhode Island introduced an amendment that would expatriate those citizens who became naturalized by a foreign government, performed public duties for a foreign government, or took up domicile in a foreign country without intent to return. Cong. Globe, 40th Cong., 2d Sess., 968, 1129, 2311 (1868). Although he characterized his proposal as covering "cases where citizens may voluntarily renounce their allegiance to this country," *id.*,

discussion, these proposals were defeated. Other bills, like the one proposed but defeated in 1818, provided merely a means by which the citizen could himself voluntarily renounce his citizenship.[18] Representative Van Trump of Ohio, who proposed such a bill, vehemently denied in supporting it that his measure would make the Government "a party to the act dissolving the tie between the citizen and his country . . . where the statute simply prescribes the manner in which the citizen shall proceed to perpetuate the evidence of his intention, or election, to renounce his citizenship by expatriation." Cong. Globe, 40th Cong., 2d Sess., 1804 (1868). He insisted that "inasmuch as the act of expatriation depends almost entirely upon a question of intention on the part of the citizen," *id.*, at 1801, "the true question is, that not only the right of expatriation, but the whole power of its exercise, rests solely and exclusively in the will of the individual," *id.*, at 1804.[19] In strongest of terms, not contradicted by any during the debates, he concluded:

> "To enforce expatriation or exile against a citizen without his consent is not a power anywhere belonging to this Government. No conservative-minded

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at 1159, it was opposed by Representative Chanler of New York who said, "So long as a citizen does not expressly dissolve his allegiance and does not swear allegiance to another country his citizenship remains in *statu quo*, unaltered and unimpaired." *Id.*, at 1016.

[18] Proposals of Representatives Pruyn of New York (*id.*, at 1130) and Van Trump of Ohio (*id.*, at 1801, 2311).

[19] While Van Trump disagreed with the 1818 opponents as to whether Congress had power to prescribe a means of voluntary renunciation of citizenship, he wholeheartedly agreed with their premise that the right of expatriation belongs to the citizen, not to the Government, and that the Constitution forbids the Government from being party to the act of expatriation. Van Trump simply thought that the opponents of the 1818 proposal failed to recognize that their mutual premise would not be violated by an

> statesman, no intelligent legislator, no sound lawyer has ever maintained any such power in any branch of the Government. The lawless precedents created in the delirium of war . . . of sending men by force into exile, as a punishment for political opinion, were violations of this great law . . . of the Constitution. . . . The men who debated the question in 1818 failed to see the true distinction. . . . They failed to comprehend that it is not the Government, but that it is the individual, who has the right and the only power of expatriation. . . . [I]t belongs and appertains to the citizen and not to the Government; and it is the evidence of his election to exercise his right, and not the power to control either the election or the right itself, which is the legitimate subject matter of legislation. There has been, and there can be, no legislation under our Constitution to control in any manner the right itself." *Ibid.*

But even Van Trump's proposal, which went no further than to provide a means of evidencing a citizen's intent to renounce his citizenship, was defeated.[20] The Act,

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Act which merely prescribed "how . . . [the rights of citizenship] might be relinquished at the option of the person in whom they were vested." Cong. Globe, 40th Cong., 2d Sess., 1804 (1868).

[20] *Id.*, at 2317. Representative Banks of Massachusetts, the Chairman of the House Committee on Foreign Affairs which drafted the bill eventually enacted into law, explained why Congress refrained from providing a means of expatriation:

"It is a subject which, in our opinion, ought not to be legislated upon. . . . [T]his comes within the scope and character of natural rights which no Government has the right to control and which no Government can confer. And wherever this subject is alluded to in the Constitution— . . . it is in the declaration that Congress shall have no power whatever to legislate upon these matters." *Id.*, at 2316.

as finally passed, merely recognized the "right of expatriation" as an inherent right of all people.[21]

The entire legislative history of the 1868 Act makes it abundantly clear that there was a strong feeling in the Congress that the only way the citizenship it conferred could be lost was by the voluntary renunciation or abandonment by the citizen himself. And this was the unequivocal statement of the Court in the case of *United States* v. *Wong Kim Ark*, 169 U. S. 649. The issues in that case were whether a person born in the United States to Chinese aliens was a citizen of the United States and whether, nevertheless, he could be excluded under the Chinese Exclusion Act, 22 Stat. 58. The Court first held that within the terms of the Fourteenth Amendment, Wong Kim Ark was a citizen of the United States, and then pointed out that though he might "renounce this citizenship, and become a citizen of . . . any other country," he had never done so. *Id.*, at 704–705. The Court then held [22] that Congress could not do anything to abridge or affect his citizenship conferred by the Fourteenth Amendment. Quoting Chief Justice Marshall's well-considered and oft-repeated dictum in *Osborn* to the effect that Congress under the power of naturalization has "a power to confer citizenship, not a power to take it away," the Court said:

> "Congress having no power to abridge the rights conferred by the Constitution upon those who have become naturalized citizens by virtue of acts of Congress, *a fortiori* no act . . . of Congress . . .

[21] 15 Stat. 223, R. S. § 1999.

[22] Some have referred to this part of the decision as a holding, see, *e. g.*, Hurst, *supra*, 29 Rocky Mt. L. Rev., at 78–79; Comment, 56 Mich. L. Rev., at 1153–1154; while others have referred to it as *obiter dictum*, see, *e. g.*, Roche, *supra*, 99 U. Pa. L. Rev., at 26–27. Whichever it was, the statement was evidently the result of serious consideration and is entitled to great weight.

> can affect citizenship acquired as a birthright, by virtue of the Constitution itself . . . . The Fourteenth Amendment, while it leaves the power, where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship." *Id.*, at 703.

To uphold Congress' power to take away a man's citizenship because he voted in a foreign election in violation of § 401 (e) would be equivalent to holding that Congress has the power to "abridge," "affect," "restrict the effect of," and "take . . . away" citizenship. Because the Fourteenth Amendment prevents Congress from doing any of these things, we agree with THE CHIEF JUSTICE's dissent in the *Perez* case that the Government is without power to rob a citizen of his citizenship under § 401 (e).[23]

Because the legislative history of the Fourteenth Amendment and of the expatriation proposals which preceded and followed it, like most other legislative history, contains many statements from which conflicting inferences can be drawn, our holding might be unwarranted if it rested entirely or principally upon that legislative history. But it does not. Our holding we think is the only one that can stand in view of the language and the purpose of the Fourteenth Amendment, and our construction of that Amendment, we believe, comports more nearly than *Perez* with the principles of liberty and equal justice to all that the entire Fourteenth Amendment was adopted to guarantee. Citizenship is no light trifle

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[23] Of course, as THE CHIEF JUSTICE said in his dissent, 356 U. S., at 66, naturalization unlawfully procured can be set aside. See, *e. g.*, *Knauer* v. *United States*, 328 U. S. 654; *Baumgartner* v. *United States*, 322 U. S. 665; *Schneiderman* v. *United States*, 320 U. S. 118.

to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power. In some instances, loss of citizenship can mean that a man is left without the protection of citizenship in any country in the world—as a man without a country. Citizenship in this Nation is a part of a cooperative affair. Its citizenry is the country and the country is its citizenry. The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship. We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.

Perez v. *Brownell* is overruled. The judgment is

Reversed.

MR. JUSTICE HARLAN, whom MR. JUSTICE CLARK, MR. JUSTICE STEWART, and MR. JUSTICE WHITE join, dissenting.

Almost 10 years ago, in *Perez* v. *Brownell*, 356 U. S. 44, the Court upheld the constitutionality of § 401 (e) of the Nationality Act of 1940, 54 Stat. 1169. The section deprives of his nationality any citizen who has voted in a foreign political election. The Court reasoned that Congress derived from its power to regulate foreign affairs authority to expatriate any citizen who intentionally commits acts which may be prejudicial to the foreign relations of the United States, and which reasonably may be deemed to indicate a dilution of his allegiance to this country. Congress, it was held, could appropriately con-

sider purposeful voting in a foreign political election to be such an act.

The Court today overrules *Perez*, and declares § 401 (e) unconstitutional, by a remarkable process of circumlocution. First, the Court fails almost entirely to dispute the reasoning in *Perez;* it is essentially content with the conclusory and quite unsubstantiated assertion that Congress is without "any general power, express or implied," to expatriate a citizen "without his assent." [1] Next, the Court embarks upon a lengthy, albeit incomplete, survey of the historical background of the congressional power at stake here, and yet, at the end, concedes that the history is susceptible of "conflicting inferences." The Court acknowledges that its conclusions might not be warranted by that history alone, and disclaims that the decision today relies, even "principally," upon it. Finally, the Court declares that its result is bottomed upon the "lan-

[1] It is appropriate to note at the outset what appears to be a fundamental ambiguity in the opinion for the Court. The Court at one point intimates, but does not expressly declare, that it adopts the reasoning of the dissent of THE CHIEF JUSTICE in *Perez*. THE CHIEF JUSTICE there acknowledged that "actions in derogation of undivided allegiance to this country" had "long been recognized" to result in expatriation, *id.*, at 68; he argued, however, that the connection between voting in a foreign political election and abandonment of citizenship was logically insufficient to support a presumption that a citizen had renounced his nationality. *Id.*, at 76. It is difficult to find any semblance of this reasoning, beyond the momentary reference to the opinion of THE CHIEF JUSTICE, in the approach taken by the Court today; it seems instead to adopt a substantially wider view of the restrictions upon Congress' authority in this area. Whatever the Court's position, it has assumed that voluntariness is here a term of fixed meaning; in fact, of course, it has been employed to describe both a specific intent to renounce citizenship, and the uncoereed commission of an act conclusively deemed by law to be a relinquishment of citizenship. Until the Court indicates with greater precision what it means by "assent," today's opinion will surely cause still greater confusion in this area of the law.

guage and the purpose" of the Citizenship Clause of the Fourteenth Amendment; in explanation, the Court offers only the terms of the clause itself, the contention that any other result would be "completely incongruous," and the essentially arcane observation that the "citizenry is the country and the country is its citizenry."

I can find nothing in this extraordinary series of circumventions which permits, still less compels, the imposition of this constitutional constraint upon the authority of Congress. I must respectfully dissent.

There is no need here to rehearse Mr. Justice Frankfurter's opinion for the Court in *Perez;* it then proved and still proves to my satisfaction that § 401 (e) is within the power of Congress.[2] It suffices simply to supplement *Perez* with an examination of the historical evidence which the Court in part recites, and which provides the only apparent basis for many of the Court's conclusions. As will be seen, the available historical evidence is not only inadequate to support the Court's abandonment of *Perez,* but, with due regard for the

[2] It is useful, however, to reiterate the essential facts of this case, for the Court's very summary statement might unfortunately cause confusion about the situation to which § 401 (e) was here applied. Petitioner emigrated from the United States to Israel in 1950, and, although the issue was not argued at any stage of these proceedings, it was assumed by the District Court that he "has acquired Israeli citizenship." 250 F. Supp. 686, 687. He voted in the election for the Israeli Knesset in 1951, and, as his Israeli Identification Booklet indicates, in various political elections which followed. Transcript of Record 1–2. In 1960, after 10 years in Israel, petitioner determined to return to the United States, and applied to the United States Consulate in Haifa for a passport. The application was rejected, and a Certificate of Loss of Nationality, based entirely on his participation in the 1951 election, was issued. Petitioner's action for declaratory judgment followed. There is, as the District Court noted, "no claim by the [petitioner] that the deprivation of his American citizenship will render him a stateless person." *Ibid.*

restraints that should surround the judicial invalidation of an Act of Congress, even seems to confirm *Perez'* soundness.

I.

Not much evidence is available from the period prior to the adoption of the Fourteenth Amendment through which the then-prevailing attitudes on these constitutional questions can now be determined. The questions pertinent here were only tangentially debated; controversy centered instead upon the wider issues of whether a citizen might under any circumstances *renounce* his citizenship, and, if he might, whether that right should be conditioned upon any formal prerequisites.[3] Even the discussion of these issues was seriously clouded by the widely accepted view that authority to regulate the incidents of citizenship had been retained, at least in part, by the several States.[4] It should therefore be remembered that the evidence which is now available may not necessarily represent any carefully considered, still less prevailing, viewpoint upon the present issues.

Measured even within these limitations, the Court's evidence for this period is remarkably inconclusive; the Court relies simply upon the rejection by Congress of

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[3] See generally Tsiang, The Question of Expatriation in America Prior to 1907, 25–70; Roche, The Expatriation Cases, 1963 Sup. Ct. Rev. 325, 327–330; Roche, Loss of American Nationality, 4 West. Pol. Q. 268.

[4] Roche, The Expatriation Cases, 1963 Sup. Ct. Rev. 325, 329. Although the evidence, which consists principally of a letter to Albert Gallatin, is rather ambiguous, Jefferson apparently believed even that a state expatriation statute could deprive a citizen of his federal citizenship. 1 Writings of Albert Gallatin 301–302 (Adams ed. 1879). His premise was presumably that state citizenship was primary, and that federal citizenship attached only through it. See Tsiang, *supra*, at 25. Gallatin's own views have been described as essentially "states' rights"; see Roche, Loss of American Nationality, 4 West. Pol. Q. 268, 271.

legislation proposed in 1794, 1797, and 1818, and upon an isolated dictum from the opinion of Chief Justice Marshall in *Osborn* v. *Bank of the United States*, 9 Wheat. 738. This, as will appear, is entirely inadequate to support the Court's conclusion, particularly in light of other and more pertinent evidence which the Court does not notice.

The expatriation of unwilling citizens was apparently first discussed in the lengthy congressional debates of 1794 and 1795, which culminated eventually in the Uniform Naturalization Act of 1795.[5] 1 Stat. 414. Little contained in those debates is pertinent here. The present question was considered only in connection with an amendment, offered by Congressman Hillhouse of Connecticut, which provided that any American who acquired a foreign citizenship should not subsequently be permitted to repatriate in the United States. Although this obscure proposal scarcely seems relevant to the present issues, it was apparently understood at least by some members to require the automatic expatriation of an American who acquired a second citizenship. Its discussion in the House consumed substantially less than one day, and of this debate only the views of two Congressmen, other than Hillhouse, were recorded by the Annals.[6] Murray of Maryland, for reasons immaterial here, supported the proposal. In response, Baldwin of Georgia urged that foreign citizenship was often conferred only as a mark of esteem, and that it would be unfair to deprive of his domestic citizenship an American honored in this fashion. There is no indication that any member believed the proposal to be forbidden by the Constitution. The measure was rejected by the House without a re-

[5] See 4 Annals of Cong. 1004 *et seq.*

[6] The discussion and rejection of the amendment are cursorily reported at 4 Annals of Cong. 1028–1030.

ported vote, and no analogous proposal was offered in the Senate. Insofar as this brief exchange is pertinent here, it establishes at most that two or more members believed the proposal both constitutional and desirable, and that some larger number determined, for reasons that are utterly obscure, that it should not be adopted.

The Court next relies upon the rejection of proposed legislation in 1797. The bill there at issue would have forbidden the entry of American citizens into the service of any foreign state in time of war; its sixth section included machinery by which a citizen might voluntarily expatriate himself.[7] The bill contained nothing which would have expatriated unwilling citizens, and the debates do not include any pronouncements relevant to that issue. It is difficult to see how the failure of that bill might be probative here.

The debates in 1817 and 1818, upon which the Court so heavily relies, are scarcely more revealing. Debate centered upon a brief bill[8] which provided merely that any citizen who wished to renounce his citizenship must first declare his intention in open court, and thereafter depart the United States. His citizenship would have terminated at the moment of his renunciation. The bill was debated only in the House; no proposal permitting the involuntary expatriation of any citizen was made or considered there or in the Senate. Nonetheless, the Court selects portions of statements made by three individual Congressmen, who apparently denied that Congress had authority to enact legislation to deprive unwilling citizens of their citizenship. These brief dicta are, by the most generous standard, inadequate to warrant the Court's broad constitutional conclusion. Moreover, it must be observed that they were in great part deductions from

[7] The sixth section is set out at 7 Annals of Cong. 349.

[8] The bill is summarized at 31 Annals of Cong. 495.

constitutional premises which have subsequently been entirely abandoned. They stemmed principally from the Jeffersonian contention that allegiance is owed by a citizen first to his State, and only through the State to the Federal Government. The spokesmen upon whom the Court now relies supposed that Congress was without authority to dissolve citizenship, since "we have no control" over "allegiance to the State . . . ." [9] The bill's opponents urged that "The relation to the State government was the basis of the relation to the General Government, and therefore, as long as a man continues a citizen of a State, he must be considered a citizen of the United States." [10] Any statute, it was thought, which dissolved federal citizenship while a man remained a citizen of a State "would be inoperative." [11] Surely the Court does not revive this entirely discredited doctrine; and yet so long as it does not, it is difficult to see that any significant support for the ruling made today may be derived from the statements on which the Court relies. To sever the statements from their constitutional premises, as the Court has apparently done, is to transform the meaning these expressions were intended to convey.

Finally, it must be remembered that these were merely the views of three Congressmen; nothing in the debates indicates that their constitutional doubts were shared by any substantial number of the other 67 members wno eventually opposed the bill. They were plainly not accepted by the 58 members who voted in the bill's favor. The bill's opponents repeatedly urged that, whatever its constitutional validity, the bill was imprudent

[9] 31 Annals of Cong. 1046.

[10] 31 Annals of Cong. 1057.

[11] *Ibid.* Roche describes the Congressmen upon whom the Court chiefly relies as "the states' rights opposition." Loss of American Nationality, 4 West. Pol. Q. 268, 276.

and undesirable. Pindall of Virginia, for example, asserted that a citizen who employed its provisions would have "motives of idleness or criminality," [12] and that the bill would thus cause "much evil." [13] McLane of Delaware feared that citizens would use the bill to escape service in the armed forces in time of war; he warned that the bill would, moreover, weaken "the love of country, so necessary to individual happiness and national prosperity." [14] He even urged that "The commission of treason, and the objects of plunder and spoil, are equally legalized by this bill." [15] Lowndes of South Carolina cautioned the House that difficulties might again arise with foreign governments over the rights of seamen if the bill were passed.[16] Given these vigorous and repeated arguments, it is quite impossible to assume, as the Court apparently has, that any substantial portion of the House was motivated wholly, or even in part, by any particular set of constitutional assumptions. These three statements must instead be taken as representative only of the beliefs of three members, premised chiefly upon constitutional doctrines which have subsequently been rejected, and expressed in a debate in which the present issues were not directly involved.

The last piece of evidence upon which the Court relies for this period is a brief *obiter dictum* from the lengthy opinion for the Court in *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 827, written by Mr. Chief Justice Marshall. This use of the dictum is entirely unpersuasive, for its terms and context make quite plain that it cannot have been intended to reach the questions pre-

[12] 31 Annals of Cong. 1047.
[13] 31 Annals of Cong. 1050.
[14] 31 Annals of Cong. 1059.
[15] *Ibid.*
[16] 31 Annals of Cong. 1051.

sented here. The central issue before the Court in *Osborn* was the right of the bank to bring its suit for equitable relief in the courts of the United States. In argument, counsel for Osborn had asserted that although the bank had been created by the laws of the United States, it did not necessarily follow that any cause involving the bank had arisen under those laws. Counsel urged by analogy that the naturalization of an alien might as readily be said to confer upon the new citizen a right to bring all his actions in the federal courts. *Id.*, at 813–814. Not surprisingly, the Court rejected the analogy, and remarked that an act of naturalization "does not proceed to give, to regulate, or to prescribe his capacities," since the Constitution demands that a naturalized citizen must in all respects stand "on the footing of a native." *Id.*, at 827. The Court plainly meant no more than that counsel's analogy is broken by Congress' inability to offer a naturalized citizen rights or capacities which differ in any particular from those given to a native-born citizen by birth. Mr. Justice Johnson's discussion of the analogy in dissent confirms the Court's purpose. *Id.*, at 875–876.

Any wider meaning, so as to reach the questions here, wrenches the dictum from its context, and attributes to the Court an observation extraneous even to the analogy before it. Moreover, the construction given to the dictum by the Court today requires the assumption that the Court in *Osborn* meant to decide an issue which had to that moment scarcely been debated, to which counsel in *Osborn* had never referred, and upon which no case had ever reached the Court. All this, it must be recalled, is in an area of the law in which the Court had steadfastly avoided unnecessary comment. See, *e. g.*, *M'Ilvaine* v. *Coxe's Lessee*, 4 Cranch 209, 212–213; *The Santissima Trinidad*, 7 Wheat. 283, 347–348. By any

standard, the dictum cannot provide material assistance to the Court's position in the present case.[17]

Before turning to the evidence from this period which has been overlooked by the Court, attention must be given an incident to which the Court refers, but upon which it apparently places relatively little reliance. In 1810, a proposed thirteenth amendment to the Consti-

[17] Similarly, the Court can obtain little support from its invocation of the dictum from the opinion for the Court in *United States* v. *Wong Kim Ark*, 169 U. S. 649, 703. The central issue there was whether a child born of Chinese nationals domiciled in the United States is an American citizen if its birth occurs in this country. The dictum upon which the Court relies, which consists essentially of a reiteration of the dictum from *Osborn*, can therefore scarcely be considered a reasoned consideration of the issues now before the Court. Moreover, the dictum could conceivably be read to hold only that no power to expatriate an unwilling citizen was conferred either by the Naturalization Clause or by the Fourteenth Amendment; if the dictum means no more, it would of course not even reach the holding in *Perez*. Finally, the dictum must be read in light of the subsequent opinion for the Court, written by Mr. Justice McKenna, in *Mackenzie* v. *Hare*, 239 U. S. 299. Despite counsel's invocation of *Wong Kim Ark*, *id.*, at 302 and 303, the Court held in *Mackenzie* that marriage between an American citizen and an alien, unaccompanied by any intention of the citizen to renounce her citizenship, nonetheless permitted Congress to withdraw her nationality. It is immaterial for these purposes that Mrs. Mackenzie's citizenship might, under the statute there, have been restored upon termination of the marital relationship; she did not consent to the loss, even temporarily, of her citizenship, and, under the proposition apparently urged by the Court today, it can therefore scarcely matter that her expatriation was subject to some condition subsequent. It seems that neither Mr. Justice McKenna, who became a member of the Court after the argument but before the decision of *Wong Kim Ark*, *supra*, at 732, nor Mr. Chief Justice White, who joined the Court's opinions in both *Wong Kim Ark* and *Mackenzie*, thought that *Wong Kim Ark* required the result reached by the Court today. Nor, it must be supposed, did the other six members of the Court who joined *Mackenzie*, despite *Wong Kim Ark*.

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tution was introduced into the Senate by Senator Reed of Maryland; the amendment, as subsequently modified, provided that any citizen who accepted a title of nobility, pension, or emolument from a foreign state, or who married a person of royal blood, should "cease to be a citizen of the United States." [18] The proposed amendment was, in a modified form, accepted by both Houses, and subsequently obtained the approval of all but one of the requisite number of States.[19] I have found nothing which indicates with any certainty why such a provision should then have been thought necessary,[20] but two reasons suggest themselves for the use of a constitutional amendment. First, the provisions may have been intended in part as a sanction for Art. I, § 9, cl. 8;[21] it may therefore have been thought more appropriate that it be placed within the Constitution itself. Second, a student of expatriation issues in this period has dismissed the preference for an amendment with the explanation that "the dominant Jeffersonian view held that citizenship was within the jurisdiction of the states; a statute would thus have been a federal usurpation of state power." [22] This second explanation is fully substantiated by the debate in

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[18] The various revisions of the proposed amendment may be traced through 20 Annals of Cong. 530, 549, 572–573, 635, 671.

[19] Ames, The Proposed Amendments to the Constitution of the United States during the First Century of Its History, 2 Ann. Rep. Am. Hist. Assn. for the Year 1896, 188.

[20] Ames, *supra*, at 187, speculates that the presence of Jerome Bonaparte in this country some few years earlier might have caused apprehension, and concludes that the amendment was merely an expression of "animosity against foreigners." *Id.*, at 188.

[21] The clause provides that "No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."

[22] Roche, The Expatriation Cases, 1963 Sup. Ct. Rev. 325, 335.

1818; the statements from that debate set out in the opinion for the Court were, as I have noted, bottomed on the reasoning that since allegiance given by an individual to a State could not be dissolved by Congress, a federal statute could not regulate expatriation. It surely follows that this "obscure enterprise" [23] in 1810, motivated by now discredited constitutional premises, cannot offer any significant guidance for solution of the important issues now before us.

The most pertinent evidence from this period upon these questions has been virtually overlooked by the Court. Twice in the two years immediately prior to its passage of the Fourteenth Amendment, Congress exercised the very authority which the Court now suggests that it should have recognized was entirely lacking. In each case, a bill was debated and adopted by both Houses which included provisions to expatriate unwilling citizens.

In the spring and summer of 1864, both Houses debated intensively the Wade-Davis bill to provide reconstruction governments for the States which had seceded to form the Confederacy. Among the bill's provisions was § 14, by which "every person who shall hereafter hold or exercise any office . . . in the rebel service . . . is hereby declared not to be a citizen of the United States." [24] Much of the debate upon the bill did not, of course, center on the expatriation provision, although it certainly did not escape critical attention.[25] Nonetheless, I have not found any indication in the debates in either House that it was supposed that Congress was without authority to deprive an unwilling citizen of his citizenship. The bill was not signed by President Lincoln before the adjourn-

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[23] *Ibid.*

[24] 6 Richardson, Messages and Papers of the Presidents 226.

[25] See, *e. g.*, the comments of Senator Brown of Missouri, Cong. Globe, 38th Cong., 1st Sess., 3460.

ment of Congress, and thus failed to become law, but a subsequent statement issued by Lincoln makes quite plain that he was not troubled by any doubts of the constitutionality of § 14.[26] Passage of the Wade-Davis bill of itself "suffices to destroy the notion that the men who drafted the Fourteenth Amendment felt that citizenship was an 'absolute.' " [27]

Twelve months later, and less than a year before its passage of the Fourteenth Amendment, Congress adopted a second measure which included provisions that permitted the expatriation of unwilling citizens. Section 21 of the Enrollment Act of 1865 provided that deserters from the military service of the United States "shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship and their rights to become citizens . . . ." [28] The same section extended these disabilities to persons who departed the United States with intent to avoid "draft into the military or naval service . . . ." [29] The bitterness of war did not cause Congress here to neglect the requirements of the Constitution; for it was urged in both Houses that § 21 as written was *ex post facto*, and thus was constitutionally

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[26] Lincoln indicated that although he was "unprepared" to be "inflexibly committed" to "any single plan of restoration," he was "fully satisfied" with the bill's provisions. 6 Richardson, Messages and Papers of the Presidents 222–223.

[27] Roche, The Expatriation Cases, 1963 Sup. Ct. Rev. 325, 343.

[28] 13 Stat. 490. It was this provision that, after various recodifications, was held unconstitutional by this Court in *Trop* v. *Dulles*, 356 U. S. 86. A majority of the Court did not there hold that the provision was invalid because Congress lacked all power to expatriate an unwilling citizen. In any event, a judgment by this Court 90 years after the Act's passage can scarcely reduce the Act's evidentiary value for determining whether Congress understood in 1865, as the Court now intimates that it did, that it lacked such power.

[29] 13 Stat. 491.

impermissible.[30] Significantly, however, it was never suggested in either debate that expatriation without a citizen's consent lay beyond Congress' authority. Members of both Houses had apparently examined intensively the section's constitutional validity, and yet had been undisturbed by the matters upon which the Court now relies.

Some doubt, based on the phrase "rights of citizenship," has since been expressed[31] that § 21 was intended to require any more than disfranchisement, but this is, for several reasons, unconvincing. First, § 21 also explicitly provided that persons subject to its provisions should not thereafter exercise various "rights of citizens"; [32] if the section had not been intended to cause expatriation, it is difficult to see why these additional provisions would have been thought necessary. Second, the executive authorities of the United States afterwards consistently construed the section as causing expatriation.[33] Third, the section was apparently understood by various courts to result in expatriation; in particular, Mr. Justice Strong, while a member of the Supreme Court of Pennsylvania, construed the section to cause a "forfeiture of citizenship," *Huber* v. *Reily*, 53 Pa. 112, 118, and although this point was not expressly reached, his general understanding of the statute was approved by this Court in *Kurtz* v. *Moffitt*, 115 U. S. 487, 501. Finally, Congress in 1867 approved an exemption from the section's provisions for those who had deserted after the termination of general hostilities, and the statute as adopted specifically described the disability from which exemption was given as a "loss of his citizenship."

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[30] Cong. Globe, 38th Cong., 2d Sess., 642–643, 1155–1156.

[31] Roche, The Expatriation Cases, 1963 Sup. Ct. Rev. 325, 336.

[32] 13 Stat. 490.

[33] Hearings before House Committee on Immigration and Naturalization on H. R. 6127, 76th Cong., 1st Sess., 38.

15 Stat. 14. The same choice of phrase occurs in the pertinent debates.[34]

It thus appears that Congress had twice, immediately before its passage of the Fourteenth Amendment, unequivocally affirmed its belief that it had authority to expatriate an unwilling citizen.

The pertinent evidence for the period prior to the adoption of the Fourteenth Amendment can therefore be summarized as follows. The Court's conclusion today is supported only by the statements, associated at least in part with a now abandoned view of citizenship, of three individual Congressmen, and by the ambiguous and inapposite dictum from *Osborn*. Inconsistent with the Court's position are statements from individual Congressmen in 1794, and Congress' passage in 1864 and 1865 of legislation which expressly authorized the expatriation of unwilling citizens. It may be that legislation adopted in the heat of war should be discounted in part by its origins, but, even if this is done, it is surely plain that the Court's conclusion is entirely unwarranted by the available historical evidence for the period prior to the passage of the Fourteenth Amendment. The evidence suggests, to the contrary, that Congress in 1865 understood that it had authority, at least in some circumstances, to deprive a citizen of his nationality.

II.

The evidence with which the Court supports its thesis that the Citizenship Clause of the Fourteenth Amendment was intended to lay at rest any doubts of Congress' inability to expatriate without the citizen's consent is no more persuasive. The evidence consists almost exclusively of two brief and general quotations from Howard

[34] See, *e. g.*, the remarks of Senator Hendricks, Cong. Globe, 40th Cong., 1st Sess., 661.

of Michigan, the sponsor of the Citizenship Clause in the Senate, and of a statement made in a debate in the House of Representatives in 1868 by Van Trump of Ohio. Measured most generously, this evidence would be inadequate to support the important constitutional conclusion presumably drawn in large part from it by the Court; but, as will be shown, other relevant evidence indicates that the Court plainly has mistaken the purposes of the clause's draftsmen.

The Amendment as initially approved by the House contained nothing which described or defined citizenship.[35] The issue did not as such even arise in the House debates; it was apparently assumed that Negroes were citizens, and that it was necessary only to guarantee to them the rights which sprang from citizenship. It is quite impossible to derive from these debates any indication that the House wished to deny itself the authority it had exercised in 1864 and 1865; so far as the House is concerned, it seems that no issues of citizenship were "at all involved." [36]

In the Senate, however, it was evidently feared that unless citizenship were defined, or some more general classification substituted, freedmen might, on the premise that they were not citizens, be excluded from the Amendment's protection. Senator Stewart thus offered an amendment which would have inserted into § 1 a definition of citizenship,[37] and Senator Wade urged as an alternative the elimination of the term "citizen" from the Amendment's first section.[38] After a caucus of the

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[35] The pertinent events are described in Flack, Adoption of the Fourteenth Amendment 83–94.

[36] *Id.*, at 84.

[37] Cong. Globe, 39th Cong., 1st Sess., 2560.

[38] Wade would have employed the formula "persons born in the United States or naturalized under the laws thereof" to measure the section's protection. Cong. Globe, 39th Cong., 1st Sess., 2768–2769.

chief supporters of the Amendment, Senator Howard announced on their behalf that they favored the addition of the present Citizenship Clause.[39]

The debate upon the clause was essentially cursory in both Houses, but there are several clear indications of its intended effect. Its sponsors evidently shared the fears of Senators Stewart and Wade that unless citizenship were defined, freedmen might, under the reasoning of the *Dred Scott* decision,[40] be excluded by the courts from the scope of the Amendment. It was agreed that, since the "courts have stumbled on the subject," it would be prudent to remove the "doubt thrown over" it.[41] The clause would essentially overrule *Dred Scott*, and place beyond question the freedmen's right of citizenship because of birth. It was suggested, moreover, that it would, by creating a basis for federal citizenship which was indisputably independent of state citizenship, preclude any effort by state legislatures to circumvent the Amendment by denying freedmen state citizenship.[42] Nothing in the debates, however, supports the Court's assertion that the clause was intended to deny Congress its authority to expatriate unwilling citizens. The evidence indicates that its draftsmen instead expected the clause only to declare unreservedly to

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[39] Cong. Globe, 39th Cong., 1st Sess., 2869. The precise terms of the discussion in the caucus were, and have remained, unknown. For contemporary comment, see Cong. Globe, 39th Cong., 1st Sess., 2939.

[40] *Scott* v. *Sandford*, 19 How. 393.

[41] Cong. Globe, 39th Cong., 1st Sess., 2768.

[42] See, *e. g.*, the comments of Senator Johnson of Maryland, Cong. Globe, 39th Cong., 1st Sess., 2893. It was subsequently acknowledged by several members of this Court that a central purpose of the Citizenship Clause was to create an independent basis of federal citizenship, and thus to overturn the doctrine of primary state citizenship. *The Slaughter-House Cases*, 16 Wall. 36, 74, 95, 112. The background of this issue is traced in tenBroek, The Antislavery Origins of the Fourteenth Amendment 71–93.

whom citizenship initially adhered, thus overturning the restrictions both of *Dred Scott* and of the doctrine of primary state citizenship, while preserving Congress' authority to prescribe the methods and terms of expatriation.

The narrow, essentially definitional purpose of the Citizenship Clause is reflected in the clear declarations in the debates that the clause would not revise the prevailing incidents of citizenship. Senator Henderson of Missouri thus stated specifically his understanding that the "section will leave citizenship where it now is." [43] Senator Howard, in the first of the statements relied upon, in part, by the Court, said quite unreservedly that "This amendment [the Citizenship Clause] which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is . . . a citizen of the United States." [44] Henderson had been present at the Senate's consideration both of the Wade-Davis bill and of the Enrollment Act, and had voted at least for the Wade-Davis bill.[45]

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[43] Cong. Globe, 39th Cong., 1st Sess., 3031. See also Flack, The Adoption of the Fourteenth Amendment 93. In the same fashion, tenBroek, *supra*, at 215–217, concludes that the whole of § 1 was "declaratory and confirmatory." *Id.*, at 217.

[44] Cong. Globe, 39th Cong., 1st Sess., 2890. See also the statement of Congressman Baker, Cong. Globe, 39th Cong., 1st Sess., App. 255, 256. Similarly, two months after the Amendment's passage through Congress, Senator Lane of Indiana remarked that the clause was "simply a re-affirmation" of the declaratory citizenship section of the Civil Rights Bill. Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? 2 Stan. L. Rev. 5, 74.

[45] Senator Henderson participated in the debates upon the Enrollment Act and expressed no doubts about the constitutionality of § 21, Cong. Globe, 38th Cong., 2d Sess., 641, but the final vote upon the measure in the Senate was not recorded. Cong. Globe, 38th Cong., 2d Sess., 643.

Howard was a member of the Senate when both bills were passed, and had actively participated in the debates upon the Enrollment Act.[46] Although his views of the two expatriation measures were not specifically recorded, Howard certainly never expressed to the Senate any doubt either of their wisdom or of their constitutionality. It would be extraordinary if these prominent supporters of the Citizenship Clause could have imagined, as the Court's construction of the clause now demands, that the clause was only "declaratory" of the law "where it now is," and yet that it would entirely withdraw a power twice recently exercised by Congress in their presence.

There is, however, even more positive evidence that the Court's construction of the clause is not that intended by its draftsmen. Between the two brief statements from Senator Howard relied upon by the Court, Howard, in response to a question, said the following:

> "I take it for granted that after a man becomes a citizen of the United States under the Constitution he cannot cease to be citizen, *except by* expatriation or *the commission of some crime by which his citizenship shall be forfeited.*" [47] (Emphasis added.)

It would be difficult to imagine a more unqualified rejection of the Court's position; Senator Howard, the clause's sponsor, very plainly believed that it would leave unimpaired Congress' power to deprive unwilling citizens of their citizenship.[48]

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[46] See, *e. g.*, Cong. Globe, 38th Cong., 2d Sess., 632.

[47] Cong. Globe, 39th Cong., 1st Sess., 2895.

[48] The issues pertinent here were not, of course, matters of great consequence in the ratification debates in the several state legislatures, but some additional evidence is nonetheless available from them. The Committee on Federal Relations of the Texas House of Representatives thus reported to the House that the Amendment's first section "proposes to deprive the States of the right . . . to

Additional confirmation of the expectations of the clause's draftsmen may be found in the legislative history, wholly overlooked by the Court, of the Act for the Relief of certain Soldiers and Sailors, adopted in 1867. 15 Stat. 14. The Act, debated by Congress within 12 months of its passage of the Fourteenth Amendment, provided an exception from the provisions of § 21 of the Enrollment Act of 1865 for those who had deserted from the Union forces after the termination of general hostilities. Had the Citizenship Clause been understood to have the effect now given it by the Court, surely this would have been clearly reflected in the debates; members would at least have noted that, upon final approval of the Amendment, which had already obtained the approval of 21 States, § 21 would necessarily be invalid. Nothing of the sort occurred; it was argued by some members that § 21 was imprudent and even unfair,[49] but Congress evidently did not suppose that it was, or would be, unconstitutional. Congress simply failed to attribute to the Citizenship

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determine what shall constitute citizenship of a State, and to transfer that right to the Federal Government." Its "object" was, they thought, "to declare negroes to be citizens of the United States." Tex. House J. 578 (1866). The Governor of Georgia reported to the legislature that the "prominent feature of the first [section] is, that it settles definitely the right of citizenship in the several States, . . . thereby depriving them in the future of all discretionary power over the subject within their respective limits, and with reference to their State Governments proper." Ga. Sen. J. 6 (1866). See also the message of Governor Cox to the Ohio Legislature, Fairman, *supra*, 2 Stan. L. Rev., at 96, and the message of Governor Fletcher to the Missouri Legislature, Mo. Sen. J. 14 (1867). In combination, this evidence again suggests that the Citizenship Clause was expected merely to declare to whom citizenship initially attaches, and to overturn the doctrine of primary state citizenship.

[49] Senator Hendricks, for example, lamented its unfairness, declared that its presence was an "embarrassment" to the country, and asserted that it "is not required any longer." Cong. Globe, 40th Cong., 1st Sess., 660–661.

Clause the constitutional consequences now discovered by the Court.[50]

Nonetheless, the Court urges that the debates which culminated in the Expatriation Act of 1868 materially support its understanding of the purposes of the Citizenship Clause. This is, for several reasons, wholly unconvincing. Initially, it should be remembered that discussion of the Act began in committee some six months after the passage of the Relief Act of 1867, by the Second Session of the Congress which had approved the Relief Act; the Court's interpretation of the history of the Expatriation Act thus demands, at the outset, the supposition that a view of the Citizenship Clause entirely absent in July had appeared vividly by the following January. Further, the purposes and background of the Act should not be forgotten. The debates were stimulated by repeated requests both from President Andrew Johnson and from the public that Congress assert the rights of naturalized Americans against the demands of their former countries.[51] The Act as finally adopted was thus intended "primarily to assail the conduct of the British Government [chiefly for its acts toward naturalized Americans resident in Ireland] and to declare the right of naturalized Americans to renounce their native allegiance"; [52] accordingly, very little of the lengthy debate was in the least pertinent to the present issues. Several members did make plain, through their proposed amendments to the bill or their

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[50] Similarly, in 1885, this Court construed § 21 without any apparent indication that the section was, or had ever been thought to be, beyond Congress' authority. *Kurtz* v. *Moffitt*, 115 U. S. 487, 501–502.

[51] Tsiang, *supra*, n. 3, at 95. President Johnson emphasized in his Third Annual Message the difficulties which were then prevalent. 6 Richardson, Messages and Papers of the Presidents 558, 580–581.

[52] Tsiang, *supra*, at 95. See also 3 Moore, Digest of International Law 579–580.

interstitial comments, that they understood Congress to have authority to expatriate unwilling citizens,[53] but in general both the issues now before the Court and questions of the implications of the Citizenship Clause were virtually untouched in the debates.

Nevertheless, the Court, in order to establish that Congress understood that the Citizenship Clause denied it such authority, fastens principally upon the speeches of Congressman Van Trump of Ohio. Van Trump sponsored, as one of many similar amendments offered to the bill by various members, a proposal to create formal machinery by which a citizen might voluntarily renounce his citizenship.[54] Van Trump himself spoke at length in support of his proposal; his principal speech consisted chiefly of a detailed examination of the debates and judicial decisions pertinent to the issues of voluntary renunciation of citizenship.[55] Never in his catalog of relevant materials did Van Trump even mention the Citizenship Clause of the Fourteenth Amendment;[56] so far as may be seen from his comments on the House floor, Van Trump evidently supposed the clause to be entirely immaterial to the issues of expatriation. This is completely characteristic of the debate in both Houses; even its draftsmen and principal supporters, such as Senator Howard, permitted the Citizenship Clause to

[53] See, *e. g.*, Cong. Globe, 40th Cong., 2d Sess., 968, 1129–1131.

[54] Van Trump's proposal contained nothing which would have expatriated any unwilling citizen, see Cong. Globe, 40th Cong., 2d Sess., 1801; its ultimate failure therefore cannot, despite the Court's apparent suggestion, help to establish that the House supposed that legislation similar to that at issue here was impermissible under the Constitution.

[55] Cong. Globe, 40th Cong., 2d Sess., 1800–1805.

[56] It should be noted that Van Trump, far from a "framer" of the Amendment, had not even been a member of the Congress which adopted it. Biographical Directory of the American Congress 1774–1961, H. R. Doc. No. 442, 85th Cong., 2d Sess., 1750.

pass unnoticed. The conclusion seems inescapable that the discussions surrounding the Act of 1868 cast only the most minimal light, if indeed any, upon the purposes of the clause, and that the Court's evidence from the debates is, by any standard, exceedingly slight.[57]

There is, moreover, still further evidence, overlooked by the Court, which confirms yet again that the Court's view of the intended purposes of the Citizenship Clause is mistaken. While the debate on the Act of 1868 was still in progress, negotiations were completed on the first of a series of bilateral expatriation treaties, which "initiated this country's policy of automatic divestment of citizenship for specified conduct affecting our foreign relations." *Perez* v. *Brownell, supra,* at 48. Seven such treaties were negotiated in 1868 and 1869 alone; [58] each was ratified by the Senate. If, as the Court now suggests, it was "abundantly clear" to Congress in 1868 that the Citizenship Clause had taken from its hands the power of expatriation, it is quite difficult to understand why these conventions were negotiated, or why, once nego-

[57] As General Banks, the Chairman of the House Committee on Foreign Affairs, carefully emphasized, the debates were intended simply to produce a declaration of the obligation of the United States to compel other countries "to consider the rights of our citizens and to bring the matter to negotiation and settlement"; the bill's proponents stood "for that and nothing more." Cong. Globe, 40th Cong., 2d Sess., 2315.

[58] The first such treaty was that with the North German Union, concluded February 22, 1868, and ratified by the Senate on March 26, 1868. 2 Malloy, Treaties, Conventions, International Acts, Protocols and Agreements between the United States and other Powers 1298. Similar treaties were reached in 1868 with Bavaria, Baden, Belgium, Hesse, and Württemberg; a treaty was reached in 1869 with Norway and Sweden. An analogous treaty was made with Mexico in 1868, but, significantly, it permitted rebuttal of the presumption of renunciation of citizenship. See generally Tsiang, *supra,* at 88.

tiated, they were not immediately repudiated by the Senate.[59]

Further, the executive authorities of the United States repeatedly acted, in the 40 years following 1868, upon the premise that a citizen might automatically be deemed to have expatriated himself by conduct short of a voluntary renunciation of citizenship; individual citizens were, as the Court indicated in *Perez,* regularly held on this basis to have lost their citizenship. Interested Members of Congress, and others, could scarcely have been unaware of the practice; as early as 1874, President Grant urged Congress in his Sixth Annual Message to supplement the Act of 1868 with a statutory declaration of the acts by which a citizen might "be deemed to have renounced or to have lost his citizenship." [60] It was the necessity to provide a more satisfactory basis for this practice that led first to the appointment of the Citizenship Board of 1906, and subsequently to the Nationality Acts of 1907 and 1940. The administrative practice in this period was described by the Court in *Perez;* it suffices here merely to emphasize that the Court today has not ventured to explain why the Citizenship Clause should, so shortly after its adoption, have been, under the Court's construction, so seriously misunderstood.

It seems to me apparent that the historical evidence which the Court in part recites is wholly inconclusive,

[59] The relevance of these treaties was certainly not overlooked in the debates in the Senate upon the Act of 1868. See, *e. g.,* Cong. Globe, 40th Cong., 2d Sess., 4205, 4211, 4329, 4331. Senator Howard attacked the treaties, but employed none of the reasons which might be suggested by the opinion for the Court today. *Id.,* at 4211.

[60] 7 Richardson, Messages and Papers of the Presidents 284, 291. See further Borchard, Diplomatic Protection of Citizens Abroad §§ 319, 324, 325.

as indeed the Court recognizes; the evidence, to the contrary, irresistibly suggests that the draftsmen of the Fourteenth Amendment did not intend, and could not have expected, that the Citizenship Clause would deprive Congress of authority which it had, to their knowledge, only recently twice exercised. The construction demanded by the pertinent historical evidence, and entirely consistent with the clause's terms and purposes, is instead that it declares to whom citizenship, as a consequence either of birth or of naturalization, initially attaches. The clause thus served at the time of its passage both to overturn *Dred Scott* and to provide a foundation for federal citizenship entirely independent of state citizenship; in this fashion it effectively guaranteed that the Amendment's protection would not subsequently be withheld from those for whom it was principally intended. But nothing in the history, purposes, or language of the clause suggests that it forbids Congress in all circumstances to withdraw the citizenship of an unwilling citizen. To the contrary, it was expected, and should now be understood, to leave Congress at liberty to expatriate a citizen if the expatriation is an appropriate exercise of a power otherwise given to Congress by the Constitution, and if the methods and terms of expatriation adopted by Congress are consistent with the Constitution's other relevant commands.

The Citizenship Clause thus neither denies nor provides to Congress any power of expatriation; its consequences are, for present purposes, exhausted by its declaration of the classes of individuals to whom citizenship initially attaches. Once obtained, citizenship is of course protected from arbitrary withdrawal by the constraints placed around Congress' powers by the Constitution; it is not proper to create from the Citizenship Clause an additional, and entirely unwarranted, restric-

tion upon legislative authority. The construction now placed on the Citizenship Clause rests, in the last analysis, simply on the Court's *ipse dixit*, evincing little more, it is quite apparent, than the present majority's own distaste for the expatriation power.

I believe that *Perez* was rightly decided, and on its authority would affirm the judgment of the Court of Appeals.

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WARDEN, MARYLAND PENITENTIARY *v.* HAYDEN.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 480. Argued April 12, 1967.—Decided May 29, 1967.

The police were informed that an armed robbery had occurred and that the suspect, respondent, had thereafter entered a certain house. Minutes later they arrived there and were told by respondent's wife that she had no objection to their searching the house. Certain officers arrested respondent in an upstairs bedroom when it became clear he was the only man in the house. Others simultaneously searched the first floor and cellar. One found weapons in a flush tank; another, looking "for a man or the money," found in a washing machine clothing of the type the suspect was said to have worn. Ammunition was also found. These items were admitted into evidence without objection at respondent's trial which resulted in his conviction. After unsuccessful state court proceedings respondent sought and was denied habeas corpus relief in the District Court. The Court of Appeals found the search lawful, but reversed on the ground that the clothing seized during the search was immune from seizure, being of "evidential value only." *Held:*

1. "The exigencies of the situation," in which the officers were in pursuit of a suspected armed felon in the house which he had entered only minutes before they arrived, permitted their warrantless entry and search. *McDonald* v. *United States,* 335 U. S. 451, 456. Pp. 298–300.

2. The distinction prohibiting seizure of items of only evidential value and allowing seizure of instrumentalities, fruits, or contraband is no longer accepted as being required by the Fourth Amendment. Pp. 300–310.

(a) There is no rational distinction between a search for "mere evidence" and one for an "instrumentality" in terms of the privacy which is safeguarded by the Fourth Amendment; nor does the language of the Amendment itself make such a distinction. Pp. 301–302.

(b) The clothing items involved here are not "testimonial" or "communicative" and their introduction did not compel respondent to become a witness against himself in violation of the Fifth Amendment. *Schmerber* v. *California,* 384 U. S. 757. Pp. 302–303.

(c) The premise that property interests control government's search and seizure rights, on which *Gouled* v. *United States*, 255 U. S. 298, partly rested, is no longer controlling as the Fourth Amendment's principal object is the protection of privacy, not property. Pp. 303–306.

(d) The related premise of *Gouled* that government may not seize evidence for the purpose of proving crime has also been discredited. The Fourth Amendment does not bar a search for that purpose provided that there is probable cause, as there was here, for the belief that the evidence sought will aid in a particular apprehension or conviction. Pp. 306–307.

(e) The remedy of suppression, with its limited, functional consequence, has made possible the rejection of both the related *Gouled* premises. P. 307.

(f) Just as the suppression of evidence does not require the return of such items as contraband, the introduction of "mere evidence" does not entitle the State to its retention if it is being wrongfully withheld. Pp. 307–308.

(g) The numerous and confusing exceptions to the "mere evidence" limitation make it questionable whether it affords any meaningful protection. P. 309.

363 F. 2d 647, reversed.

Franklin Goldstein, Assistant Attorney General of Maryland, argued the cause for petitioner. With him on the brief was *Francis B. Burch*, Attorney General.

Albert R. Turnbull, by appointment of the Court, 385 U. S. 985, argued the cause and filed a brief for respondent, *pro hac vice*, by special leave of Court.

Ralph S. Spritzer, by special leave of Court, argued the cause for the United States, as *amicus curiae*, urging reversal. With him on the brief were *Solicitor General Marshall*, *Assistant Attorney General Vinson*, *Nathan Lewin* and *Beatrice Rosenberg*.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

We review in this case the validity of the proposition that there is under the Fourth Amendment a "distinction

between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime." [1]

A Maryland court sitting without a jury convicted respondent of armed robbery. Items of his clothing, a cap, jacket, and trousers, among other things, were seized during a search of his home, and were admitted in evidence without objection. After unsuccessful state court proceedings, he sought and was denied federal habeas corpus relief in the District Court for Maryland.[2] A divided panel of the Court of Appeals for the Fourth Circuit reversed. 363 F. 2d 647. The Court of Appeals believed that *Harris* v. *United States*, 331 U. S. 145, 154, sustained the validity of the search, but held that respondent was correct in his contention that the clothing seized was improperly admitted in evidence because the items had "evidential value only" and therefore were not

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[1] *Harris* v. *United States*, 331 U. S. 145, 154; see also *Gouled* v. *United States*, 255 U. S. 298; *United States* v. *Lefkowitz*, 285 U. S. 452, 465–466; *United States* v. *Rabinowitz*, 339 U. S. 56, 64, n. 6; *Abel* v. *United States*, 362 U. S. 217, 234–235.

[2] Hayden did not appeal from his conviction. He first sought relief by an application under the Maryland Post Conviction Procedure Act which was denied without hearing. The Maryland Court of Appeals reversed and remanded for a hearing. 233 Md. 613, 195 A. 2d 692. The trial court denied relief after hearing, concluding "that the search of his home and the seizure of the articles in question were proper." His application for federal habeas corpus relief resulted, after hearing in the District Court, in the same conclusion.

lawfully subject to seizure. We granted certiorari. 385 U. S. 926. We reverse.[3]

I.

About 8 a. m. on March 17, 1962, an armed robber entered the business premises of the Diamond Cab Company in Baltimore, Maryland. He took some $363 and ran. Two cab drivers in the vicinity, attracted by shouts of "Holdup," followed the man to 2111 Cocoa Lane. One driver notified the company dispatcher by radio that the man was a Negro about 5'8" tall, wearing a light cap and dark jacket, and that he had entered the house on Cocoa Lane. The dispatcher relayed the information to police who were proceeding to the scene of the robbery. Within minutes, police arrived at the house in a number of patrol cars. An officer knocked and announced their presence. Mrs. Hayden answered, and the officers told her they believed that a robber had entered the house, and asked to search the house. She offered no objection.[4]

[3] The State claims that, since Hayden failed to raise the search and seizure question at trial, he deliberately bypassed state remedies and should be denied an opportunity to assert his claim in federal court. See *Henry* v. *Mississippi*, 379 U. S. 443; *Fay* v. *Noia*, 372 U. S. 391. Whether or not the Maryland Court of Appeals actually intended, when it reversed the state trial court's denial of post-conviction relief, that Hayden be afforded a hearing on the merits of his claim, it is clear that the trial court so understood the order of the Court of Appeals. A hearing was held in the state courts, and the claim denied on the merits. In this circumstance, the Fourth Circuit was correct in rejecting the State's deliberate-bypassing claim. The deliberate-bypass rule is applicable only "to an applicant who has deliberately by-passed the orderly procedure of the state courts *and in so doing has forfeited his state court remedies.*" *Fay* v. *Noia*, *supra*, 372 U. S., at 438. (Emphasis added.) But see *Nelson* v. *California*, 346 F. 2d 73, 82 (C. A. 9th Cir. 1965).

[4] The state postconviction court found that Mrs. Hayden "gave the policeman permission to enter the home." The federal habeas corpus court stated it "would be justified in accepting the findings

The officers spread out through the first and second floors and the cellar in search of the robber. Hayden was found in an upstairs bedroom feigning sleep. He was arrested when the officers on the first floor and in the cellar reported that no other man was in the house. Meanwhile an officer was attracted to an adjoining bathroom by the noise of running water, and discovered a shotgun and a pistol in a flush tank; another officer who, according to the District Court, "was searching the cellar for a man or the money" found in a washing machine a jacket and trousers of the type the fleeing man was said to have worn. A clip of ammunition for the pistol and a cap were found under the mattress of Hayden's bed, and ammunition for the shotgun was found in a bureau drawer in Hayden's room. All these items of evidence were introduced against respondent at his trial.

II.

We agree with the Court of Appeals that neither the entry without warrant to search for the robber, nor the search for him without warrant was invalid. Under the circumstances of this case, "the exigencies of the situation made that course imperative." *McDonald* v. *United States,* 335 U. S. 451, 456. The police were informed that an armed robbery had taken place, and that the suspect had entered 2111 Cocoa Lane less than five minutes before they reached it. They acted reasonably when they entered the house and began to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them. The Fourth Amendment does not require police officers to delay in the course of an investigation

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of historical fact made by Judge Sodaro on that issue . . . ," but concluded that resolution of the issue would be unnecessary, because the officers were "justified in entering and searching the house for the felon, for his weapons and for the fruits of the robbery."

if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape.

We do not rely upon *Harris* v. *United States, supra,* in sustaining the validity of the search. The principal issue in *Harris* was whether the search there could properly be regarded as incident to the lawful arrest, since Harris was in custody before the search was made and the evidence seized. Here, the seizures occurred prior to or immediately contemporaneous with Hayden's arrest, as part of an effort to find a suspected felon, armed, within the house into which he had run only minutes before the police arrived. The permissible scope of search must, therefore, at the least, be as broad as may reasonably be necessary to prevent the dangers that the suspect at large in the house may resist or escape.

It is argued that, while the weapons, ammunition, and cap may have been seized in the course of a search for weapons, the officer who seized the clothing was searching neither for the suspect nor for weapons when he looked into the washing machine in which he found the clothing. But even if we assume, although we do not decide, that the exigent circumstances in this case made lawful a search without warrant only for the suspect or his weapons, it cannot be said on this record that the officer who found the clothes in the washing machine was not searching for weapons. He testified that he was searching for the man or the money, but his failure to state explicitly that he was searching for weapons, in the absence of a specific question to that effect, can hardly be accorded controlling weight. He knew that the robber was armed and he did not know that some

weapons had been found at the time he opened the machine.[5] In these circumstances the inference that he was in fact also looking for weapons is fully justified.

III.

We come, then, to the question whether, even though the search was lawful, the Court of Appeals was correct in holding that the seizure and introduction of the items of clothing violated the Fourth Amendment because they are "mere evidence." The distinction made by some of our cases between seizure of items of evidential value only and seizure of instrumentalities, fruits, or contraband has been criticized by courts[6] and commentators.[7] The Court of Appeals, however, felt "obligated to adhere to it." 363 F. 2d, at 655. We today reject the distinction as based on premises no longer

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[5] The officer was asked in the District Court whether he found the money. He answered that he did not, and stated: "By the time I had gotten down into the basement I heard someone say upstairs, 'There's a man up here.'" He was asked: "What did you do then?" and answered: "By this time I had already discovered some clothing which fit the description of the clothing worn by the subject that we were looking for . . . ." It is clear from the record and from the findings that the weapons were found after or at the same time the police found Hayden.

[6] *People* v. *Thayer*, 63 Cal. 2d 635, 408 P. 2d 108, cert. denied, 384 U. S. 908; *State* v. *Bisaccia*, 45 N. J. 504, 213 A. 2d 185. Compare *United States* v. *Poller*, 43 F. 2d 911, 914 (C. A. 2d Cir. 1930).

[7] *E. g.*, Chafee, The Progress of the Law, 1919–1922, 35 Harv. L. Rev. 673 (1922); Kamisar, The Wiretapping-Eavesdropping Problem: A Professor's View, 44 Minn. L. Rev. 891, 914–918 (1960); Kaplan, Search and Seizure: A No-Man's Land in the Criminal Law, 49 Calif. L. Rev. 474, 478 (1961); Comment, 45 N. C. L. Rev. 512 (1967); Comment, 66 Col. L. Rev. 355 (1966); Comment, 20 U. Chi. L. Rev. 319 (1953); Comment, 31 Yale L. J. 518 (1922). Compare, *e. g.*, Fraenkel, Concerning Searches and Seizures, 34 Harv. L. Rev. 361 (1921); Note, 54 Geo. L. J. 593 (1966).

accepted as rules governing the application of the Fourth Amendment.[8]

We have examined on many occasions the history and purposes of the Amendment.[9] It was a reaction to the evils of the use of the general warrant in England and the writs of assistance in the Colonies, and was intended to protect against invasions of "the sanctity of a man's home and the privacies of life," *Boyd* v. *United States*, 116 U. S. 616, 630, from searches under indiscriminate, general authority. Protection of these interests was assured by prohibiting all "unreasonable" searches and seizures, and by requiring the use of warrants, which particularly describe "the place to be searched, and the persons or things to be seized," thereby interposing "a magistrate between the citizen and the police," *McDonald* v. *United States*, *supra*, 335 U. S., at 455.

Nothing in the language of the Fourth Amendment supports the distinction between "mere evidence" and instrumentalities, fruits of crime, or contraband. On its face, the provision assures the "right of the people to be secure in their persons, houses, papers, and effects . . . ," without regard to the use to which any of these things are applied. This "right of the people" is certainly unrelated to the "mere evidence" limitation. Privacy is disturbed no more by a search directed to a purely evidentiary object than it is by a search directed to an instrumen-

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[8] This Court has approved the seizure and introduction of items having only evidential value without, however, considering the validity of the distinction rejected today. See *Schmerber* v. *California*, 384 U. S. 757; *Cooper* v. *California*, 386 U. S. 58.

[9] *E. g.*, *Stanford* v. *Texas*, 379 U. S. 476, 481–485; *Marcus* v. *Search Warrant*, 367 U. S. 717, 724–729; *Frank* v. *Maryland*, 359 U. S. 360, 363–365. See generally Lasson, The History and Development of the Fourth Amendment to the United States Constitution (1937); Landynski, Search and Seizure and the Supreme Court (1966).

tality, fruit, or contraband. A magistrate can intervene in both situations, and the requirements of probable cause and specificity can be preserved intact. Moreover, nothing in the nature of property seized as evidence renders it more private than property seized, for example, as an instrumentality; quite the opposite may be true. Indeed, the distinction is wholly irrational, since, depending on the circumstances, the same "papers and effects" may be "mere evidence" in one case and "instrumentality" in another. See Comment, 20 U. Chi. L. Rev. 319, 320–322 (1953).

In *Gouled* v. *United States,* 255 U. S. 298, 309, the Court said that search warrants "may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding . . . ." The Court derived from *Boyd* v. *United States, supra,* the proposition that warrants "may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken," 255 U. S., at 309; that is, when the property is an instrumentality or fruit of crime, or contraband. Since it was "impossible to say, on the record . . . that the Government had any interest" in the papers involved "other than as evidence against the accused . . . ," "to permit them to be used in evidence would be, in effect, as ruled in the *Boyd Case,* to compel the defendant to become a witness against himself." *Id.,* at 311.

The items of clothing involved in this case are not "testimonial" or "communicative" in nature, and their introduction therefore did not compel respondent to be-

come a witness against himself in violation of the Fifth Amendment. *Schmerber* v. *California,* 384 U. S. 757. This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure.

The Fourth Amendment ruling in *Gouled* was based upon the dual, related premises that historically the right to search for and seize property depended upon the assertion by the Government of a valid claim of superior interest, and that it was not enough that the purpose of the search and seizure was to obtain evidence to use in apprehending and convicting criminals. The common law of search and seizure after *Entick* v. *Carrington,* 19 How. St. Tr. 1029, reflected Lord Camden's view, derived no doubt from the political thought of his time, that the "great end, for which men entered into society, was to secure their property." *Id.,* at 1066. Warrants were "allowed only where the primary right to such a search and seizure is in the interest which the public or complainant may have in the property seized." Lasson, The History and Development of the Fourth Amendment to the United States Constitution 133–134. Thus stolen property—the fruits of crime—was always subject to seizure. And the power to search for stolen property was gradually extended to cover "any property which the private citizen was not permitted to possess," which included instrumentalities of crime (because of the early notion that items used in crime were forfeited to the State) and contraband. Kaplan, Search and Seizure: A No-Man's Land in the Criminal Law, 49 Calif. L. Rev. 474, 475. No separate governmental interest in seizing evidence to apprehend and convict criminals was recognized; it was required that some property interest be asserted. The remedial structure also reflected these dual premises. Trespass, replevin, and the other means of

redress for persons aggrieved by searches and seizures, depended upon proof of a superior property interest. And since a lawful seizure presupposed a superior claim, it was inconceivable that a person could recover property lawfully seized. As Lord Camden pointed out in *Entick* v. *Carrington, supra,* at 1066, a general warrant enabled "the party's own property [to be] seized before and without conviction, and he has no power to reclaim his goods, even after his innocence is cleared by acquittal."

The premise that property interests control the right of the Government to search and seize has been discredited. Searches and seizures may be "unreasonable" within the Fourth Amendment even though the Government asserts a superior property interest at common law. We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts. See *Jones* v. *United States,* 362 U. S. 257, 266; *Silverman* v. *United States,* 365 U. S. 505, 511. This shift in emphasis from property to privacy has come about through a subtle interplay of substantive and procedural reform. The remedial structure at the time even of *Weeks* v. *United States,* 232 U. S. 383, was arguably explainable in property terms. The Court held in *Weeks* that a defendant could petition *before* trial for the return of his illegally seized property, a proposition not necessarily inconsistent with *Adams* v. *New York,* 192 U. S. 585, which held in effect that the property issues involved in search and seizure are collateral to a criminal proceeding.[10] The remedial structure finally escaped the bounds of common law property limitations in *Silverthorne*

[10] Both *Weeks* and *Adams* were written by Justice Day, and joined by several of the same Justices, including Justice Holmes.

Lumber Co. v. *United States,* 251 U. S. 385, and *Gouled* v. *United States, supra,* when it became established that suppression might be sought during a criminal trial, and under circumstances which would not sustain an action in trespass or replevin. Recognition that the role of the Fourth Amendment was to protect against invasions of privacy demanded a remedy to condemn the seizure in *Silverthorne,* although no possible common law claim existed for the return of the copies made by the Government of the papers it had seized. The remedy of suppression, necessarily involving only the limited, functional consequence of excluding the evidence from trial, satisfied that demand.

The development of search and seizure law since *Silverthorne* and *Gouled* is replete with examples of the transformation in substantive law brought about through the interaction of the felt need to protect privacy from unreasonable invasions and the flexibility in rulemaking made possible by the remedy of exclusion. We have held, for example, that intangible as well as tangible evidence may be suppressed, *Wong Sun* v. *United States,* 371 U. S. 471, 485–486, and that an actual trespass under local property law is unnecessary to support a remediable violation of the Fourth Amendment, *Silverman* v. *United States, supra.* In determining whether someone is a "person aggrieved by an unlawful search and seizure" we have refused "to import into the law . . . subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical." *Jones* v. *United States, supra,* 362 U. S., at 266. And with particular relevance here, we have given recognition to the interest in privacy despite the complete absence of a property claim by suppressing the very items which at

common law could be seized with impunity: stolen goods, *Henry* v. *United States*, 361 U. S. 98; instrumentalities, *Beck* v. *Ohio*, 379 U. S. 89; *McDonald* v. *United States*, *supra;* and contraband, *Trupiano* v. *United States*, 334 U. S. 699; *Aguilar* v. *Texas*, 378 U. S. 108.

The premise in *Gouled* that government may not seize evidence simply for the purpose of proving crime has likewise been discredited. The requirement that the Government assert in addition some property interest in material it seizes has long been a fiction,[11] obscuring the reality that government has an interest in solving crime. *Schmerber* settled the proposition that it is reasonable, within the terms of the Fourth Amendment, to conduct otherwise permissible searches for the purpose of obtaining evidence which would aid in apprehending and convicting criminals. The requirements of the Fourth Amendment can secure the same protection of privacy

[11] At common law the Government did assert a superior property interest when it searched lawfully for stolen property, since the procedure then followed made it necessary that the true owner swear that his goods had been taken. But no such procedure need be followed today; the Government may demonstrate probable cause and lawfully search for stolen property even though the true owner is unknown or unavailable to request and authorize the Government to assert his interest. As to instrumentalities, the Court in *Gouled* allowed their seizure, not because the Government had some property interest in them (under the ancient, fictitious forfeiture theory), but because they could be used to perpetrate further crime. 255 U. S., at 309. The same holds true, of course, for "mere evidence"; the prevention of crime is served at least as much by allowing the Government to identify and capture the criminal, as it is by allowing the seizure of his instrumentalities. Finally, contraband is indeed property in which the Government holds a superior interest, but only because the Government decides to vest such an interest in itself. And while there may be limits to what may be declared contraband, the concept is hardly more than a form through which the Government seeks to prevent and deter crime.

whether the search is for "mere evidence" or for fruits, instrumentalities or contraband. There must, of course, be a nexus—automatically provided in the case of fruits, instrumentalities or contraband—between the item to be seized and criminal behavior. Thus in the case of "mere evidence," probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. In so doing, consideration of police purposes will be required. Cf. *Kremen* v. *United States*, 353 U. S. 346. But no such problem is presented in this case. The clothes found in the washing machine matched the description of those worn by the robber and the police therefore could reasonably believe that the items would aid in the identification of the culprit.

The remedy of suppression, moreover, which made possible protection of privacy from unreasonable searches without regard to proof of a superior property interest, likewise provides the procedural device necessary for allowing otherwise permissible searches and seizures conducted solely to obtain evidence of crime. For just as the suppression of evidence does not entail a declaration of superior property interest in the person aggrieved, thereby enabling him to suppress evidence unlawfully seized despite his inability to demonstrate such an interest (as with fruits, instrumentalities, contraband), the refusal to suppress evidence carries no declaration of superior property interest in the State, and should thereby enable the State to introduce evidence lawfully seized despite its inability to demonstrate such an interest. And, unlike the situation at common law, the owner of property would not be rendered remediless if "mere evidence" could lawfully be seized to prove crime. For just as the suppression of evidence does not in itself necessarily entitle the aggrieved person to its return (as, for example, contraband), the introduction of "mere evidence" does not in

itself entitle the State to its retention. Where public officials "unlawfully seize *or hold* a citizen's realty or chattels, recoverable by appropriate action at law or in equity . . . ," the true owner may "bring his possessory action to reclaim that which is wrongfully withheld." *Land* v. *Dollar*, 330 U. S. 731, 738. (Emphasis added.) See *Burdeau* v. *McDowell*, 256 U. S. 465, 474.

The survival of the *Gouled* distinction is attributable more to chance than considered judgment. Legislation has helped perpetuate it. Thus, Congress has never authorized the issuance of search warrants for the seizure of mere evidence of crime. See *Davis* v. *United States*, 328 U. S. 582, 606 (dissenting opinion of Mr. Justice Frankfurter). Even in the Espionage Act of 1917, where Congress for the first time granted general authority for the issuance of search warrants, the authority was limited to fruits of crime, instrumentalities, and certain contraband. 40 Stat. 228. *Gouled* concluded, needlessly it appears, that the Constitution virtually limited searches and seizures to these categories.[12] After *Gouled*, pressure

[12] *Gouled* was decided on certified questions. The only question which referred to the Espionage Act of 1917 stated: "Are papers of . . . evidential value . . . , when taken under search warrants issued pursuant to Act of June 15, 1917, from the house or office of the person so suspected,—seized and taken in violation of the 4th amendment?" *Gouled* v. *United States*, No. 250, Oct. Term, 1920, Certificate, p. 4. Thus the form in which the case was certified made it difficult if not impossible "to limit the decision to the sensible proposition of statutory construction, that Congress had not as yet authorized the seizure of purely evidentiary material." Chafee, *op. cit. supra*, at 699. The Government assumed the validity of petitioner's argument that *Entick* v. *Carrington*, *Boyd* v. *United States*, and other authorities established the constitutional illegality of seizures of private papers for use as evidence. *Gouled* v. *United States*, *supra*, Brief for the United States, p. 50. It argued, complaining of the absence of a record, that the papers introduced in evidence were instrumentalities of crime. The Court ruled that the

to test this conclusion was slow to mount. Rule 41 (b) of the Federal Rules of Criminal Procedure incorporated the *Gouled* categories as limitations on federal authorities to issue warrants, and *Mapp* v. *Ohio*, 367 U. S. 643, only recently made the "mere evidence" rule a problem in the state courts. Pressure against the rule in the federal courts has taken the form rather of broadening the categories of evidence subject to seizure, thereby creating considerable confusion in the law. See, *e. g.*, Note, 54 Geo. L. J. 593, 607–621 (1966).

The rationale most frequently suggested for the rule preventing the seizure of evidence is that "limitations upon the fruit to be gathered tend to limit the quest itself." *United States* v. *Poller*, 43 F. 2d 911, 914 (C. A. 2d Cir. 1930). But privacy "would be just as well served by a restriction on search to the even-numbered days of the month. . . . And it would have the extra advantage of avoiding hair-splitting questions . . . ." Kaplan, *op. cit. supra*, at 479. The "mere evidence" limitation has spawned exceptions so numerous and confusion so great, in fact, that it is questionable whether it affords meaningful protection. But if its rejection does enlarge the area of permissible searches, the intrusions are nevertheless made after fulfilling the probable cause and particularity requirements of the Fourth Amendment and after the intervention of "a neutral and detached magis-

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record before it revealed no government interest in the papers other than as evidence against the accused. 255 U. S., at 311.

Significantly, *Entick* v. *Carrington* itself has not been read by the English courts as making unlawful the seizure of all papers for use as evidence. See *Dillon* v. *O'Brien*, 20 L. R. Ir. 300; *Elias* v. *Pasmore*, [1934] 2 K. B. 164. Although *Dillon*, decided in 1887, involved instrumentalities, the court did not rely on this fact, but rather on "the interest which the State has in a person guilty (or reasonably believed to be guilty) of a crime being brought to justice . . . ." 20 L. R. Ir., at 317.

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trate . . . ." *Johnson* v. *United States*, 333 U. S. 10, 14. The Fourth Amendment allows intrusions upon privacy under these circumstances, and there is no viable reason to distinguish intrusions to secure "mere evidence" from intrusions to secure fruits, instrumentalities, or contraband.

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE FORTAS, with whom THE CHIEF JUSTICE joins, concurring.

While I agree that the Fourth Amendment should not be held to require exclusion from evidence of the clothing as well as the weapons and ammunition found by the officers during the search, I cannot join in the majority's broad—and in my judgment, totally unnecessary—repudiation of the so-called "mere evidence" rule.

Our Constitution envisions that searches will ordinarily follow procurement by police of a valid search warrant. Such warrants are to issue only on probable cause, and must describe with particularity the persons or things to be seized. There are exceptions to this rule. Searches may be made incident to a lawful arrest, and—as today's decision indicates—in the course of "hot pursuit." But searches under each of these exceptions have, until today, been confined to those essential to fulfill the purpose of the exception: that is, we have refused to permit use of articles the seizure of which could not be strictly tied to and justified by the exigencies which excused the warrantless search. The use in evidence of weapons seized in a "hot pursuit" search or search incident to arrest satisfies this criterion because of the need to protect the arresting officers from weapons to which the suspect might resort. The search for and seizure of fruits are, of course, justifiable on independent grounds: The fruits

are an object of the pursuit or arrest of the suspect, and should be restored to their true owner. The seizure of contraband has been justified on the ground that the suspect has not even a bare possessory right to contraband. See, *e. g., Boyd* v. *United States,* 116 U. S. 616, 623–624 (1886); *United States* v. *Kirschenblatt,* 16 F. 2d 202, 203 (C. A. 2d Cir. 1926) (L. Hand, J.).

Similarly, we have forbidden the use of articles seized in such a search unless obtained from the person of the suspect or from the immediate vicinity. Since a warrantless search is justified only as incident to an arrest or "hot pursuit," this Court and others have held that its scope does not include permission to search the entire building in which the arrest occurs, or to rummage through locked drawers and closets, or to search at another time or place. *James* v. *Louisiana,* 382 U. S. 36 (1965); *Stoner* v. *California,* 376 U. S. 483, 486–487 (1964); *Preston* v. *United States,* 376 U. S. 364, 367 (1964); *United States* v. *Lefkowitz,* 285 U. S. 452 (1932); *Go-Bart Co.* v. *United States,* 282 U. S. 344, 358 (1931); *Agnello* v. *United States,* 269 U. S. 20, 30–31 (1925); *United States* v. *Kirschenblatt, supra.*[1]

In the present case, the articles of clothing admitted into evidence are not within any of the traditional categories which describe what materials may be seized, either with or without a warrant. The restrictiveness of these categories has been subjected to telling criticism,[2] and

[1] It is true that this Court has not always been as vigilant as it should to enforce these traditional and extremely important restrictions upon the scope of such searches. See *United States* v. *Rabinowitz,* 339 U. S. 56, 68–86 (1950) (Frankfurter, J., dissenting); *Harris* v. *United States,* 331 U. S. 145, 155–198 (1947) (dissenting opinions).

[2] See, *e. g., People* v. *Thayer,* 63 Cal. 2d 635, 408 P. 2d 108 (1965) (Traynor, C. J.), cert. denied, 384 U. S. 908 (1966); Kaplan, Search and Seizure: A No-Man's Land in the Criminal Law, 49 Calif. L. Rev. 474, 478 (1961).

although I believe that we should approach expansion of these categories with the diffidence which their imposing provenance commands, I agree that the use of identifying clothing worn in the commission of a crime and seized during "hot pursuit" is within the spirit and intendment of the "hot pursuit" exception to the search-warrant requirement. That is because the clothing is pertinent to identification of the person hotly pursued as being, in fact, the person whose pursuit was justified by connection with the crime. I would frankly place the ruling on that basis. I would not drive an enormous and dangerous hole in the Fourth Amendment to accommodate a specific and, I think, reasonable exception.

As my Brother DOUGLAS notes, *post*, opposition to general searches is a fundamental of our heritage and of the history of Anglo-Saxon legal principles. Such searches, pursuant to "writs of assistance," were one of the matters over which the American Revolution was fought. The very purpose of the Fourth Amendment was to outlaw such searches, which the Court today sanctions. I fear that in gratuitously striking down the "mere evidence" rule, which distinguished members of this Court have acknowledged as essential to enforce the Fourth Amendment's prohibition against general searches, the Court today needlessly destroys, root and branch, a basic part of liberty's heritage.

MR. JUSTICE DOUGLAS, dissenting.

We start with the Fourth Amendment which provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

This constitutional guarantee, now as applicable to the States (*Mapp* v. *Ohio*, 367 U. S. 643) as to the Federal Government, has been thought, until today, to have two faces of privacy:

(1) One creates a zone of privacy that may not be invaded by the police through raids, by the legislators through laws, or by magistrates through the issuance of warrants.

(2) A second creates a zone of privacy that may be invaded either by the police in hot pursuit or by a search incident to arrest or by a warrant issued by a magistrate on a showing of probable cause.

The *first* has been recognized from early days in Anglo-American law. Search warrants, for seizure of stolen property, though having an ancient lineage, were criticized even by Coke. Institutes Bk. 4, pp. 176–177.

As stated by Lord Camden in *Entick* v. *Carrington*, 19 How. St. Tr. 1029, 1067, even warrants authorizing seizure of stolen goods were looked upon with disfavor but "crept into the law by imperceptible practice." By the time of Charles II they had burst their original bounds and were used by the Star Chamber to find evidence among the files and papers of political suspects. Thus in the trial of Algernon Sidney in 1683 for treason "papers, which were said to be found in my [Sidney's] house, were produced as another witness" (9 How. St. Tr. 818, 901) and the defendant was executed. *Id.*, at 906–907. From this use of papers as evidence there grew up the practice of the Star Chamber empowering a person "to search in all places, where books were printing, in order to see if the printer had a licence; and if upon such search he found any books which he suspected to be libellous against the church or state, he was to seize them, and carry them before the proper magistrate." *Entick* v. *Carrington*, *supra*, at 1069. Thus the general warrant became a powerful instrument

in proceedings for seditious libel against printers and authors. *Ibid.* John Wilkes led the campaign against the general warrant. *Boyd* v. *United States,* 116 U. S. 616, 625. Wilkes won (*Entick* v. *Carrington, supra,* decided in 1765); and Lord Camden's opinion not only outlawed the general warrant (*id.,* at 1072) but went on to condemn searches "for evidence" with or without a general warrant:

> "There is no process against papers in civil causes. It has been often tried, but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action.
>
> "In the criminal law such a proceeding was never heard of; and yet there are some crimes, such for instance as murder, rape, robbery, and housebreaking, to say nothing of forgery and perjury, that are more atrocious than libelling. But our law has provided no paper-search in these cases to help forward the conviction.
>
> "Whether this procedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say.
>
> "It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty." *Id.,* at 1073.

Thus Lord Camden decided two things: (1) that searches for evidence violated the principle against self-incrimination; (2) that general warrants were void.

This decision, in the very forefront when the Fourth Amendment was adopted, underlines the construction that it covers something other than the form of the warrant [1] and creates a zone of privacy which no government official may enter.

The complaint of Bostonians, while including the general warrants, went to the point of police invasions of personal sanctuaries:

> " 'A List of Infringements and Violations of Rights' drawn up by the Boston town meeting late in 1772 alluded to a number of personal rights which had allegedly been violated by agents of the crown. The list included complaints against the writs of assistance which had been employed by royal officers in their searches for contraband. The Bostonians complained that 'our houses and even our bed chambers are exposed to be ransacked, our boxes, chests, and trunks broke open, ravaged and plundered by wretches, whom no prudent man would venture to employ even as menial servants.' " Rutland, The Birth of the Bill of Rights 25 (1955).

The debates concerning the Bill of Rights did not focus on the precise point with which we here deal. There was much talk about the general warrants and the fear of them. But there was also some reference to the sanctity of one's home and his personal belongings, even

[1] The Virginia Declaration of Rights, June 12, 1776, in its Article 10 proclaimed only against "general warrants." See Rutland, The Birth of the Bill of Rights 232 (1955). And the definition of the general warrant included not only a license to search for everything in a named place but to search all and any places in the discretion of the officers. *Frisbie* v. *Butler*, 1 Kirby 213 (Conn.). See generally Quincy's Mass. Rep. 1761–1772 Appendix I for the forms of these writs.

including the clothes he wore. Thus in Virginia, Patrick Henry said:

> "The officers of Congress may come upon you now, fortified with all the terrors of paramount federal authority. Excisemen may come in multitudes; for the limitation of their numbers no man knows. They may, unless the general government be restrained by a bill of rights, or some similar restriction, go into your cellars and rooms, and search, ransack, and measure, every thing you eat, drink, and wear. They ought to be restrained within proper bounds." 3 Elliot's Debates 448–449.

This indicates that the Fourth Amendment has the dual aspect that I have mentioned. Certainly the debates nowhere suggest that it was concerned only with regulating the form of warrants.

This is borne out by what happened in the Congress. In the House the original draft read as follows:

> "The right of the people to be secured in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched and the persons or things to be seized." 1 Annals of Cong. 754.

That was amended to read "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches," etc. *Ibid.* Mr. Benson, Chairman of a Committee of Three to arrange the amendments, objected to the words "by warrants issuing" and proposed to alter the amendment so as to read "and no warrant shall issue." *Ibid.* But Benson's amendment was defeated. *Ibid.* And if the

story had ended there, it would be clear that the Fourth Amendment touched only the form of the warrants and the manner of their issuance. But when the Benson Committee later reported the Fourth Amendment to the House, it was in the form he had earlier proposed and was then accepted. 1 Annals of Cong. 779. The Senate agreed. Senate Journal August 25, 1789.

Thus it is clear that the Fourth Amendment has two faces of privacy, a conclusion emphasized by Lasson, The History and Development of the Fourth Amendment to the United States Constitution 103 (1937):

> "As reported by the Committee of Eleven and corrected by Gerry, the Amendment was a one-barrelled affair, directed apparently only to the essentials of a valid warrant. The general principle of freedom from unreasonable search and seizure seems to have been stated only by way of premise, and the positive inhibition upon action by the Federal Government limited consequently to the issuance of warrants without probable cause, etc. That Benson interpreted it in this light is shown by his argument that although the clause was good as far as it went, *it was not sufficient*, and by the change which he advocated to obviate this objection. The provision as he proposed it contained *two* clauses. The general right of security from unreasonable search and seizure was given a sanction of its own and the amendment thus intentionally given a broader scope. That the prohibition against 'unreasonable searches' was intended, accordingly, to cover something other than the form of the warrant is a question no longer left to implication to be derived from the phraseology of the Amendment."

Lord Camden's twofold classification of zones of privacy was said by Cooley to be reflected in the Fourth Amendment:

> "The warrant is not allowed for the purpose of obtaining evidence of an intended crime; but only after lawful evidence of an offence actually committed. Nor even then is it allowable to invade one's privacy for the sole purpose of obtaining evidence against him, except in a few special cases where that which is the subject of the crime is supposed to be concealed, and the public or the complainant has an interest in it or in its destruction." Constitutional Limitations 431–432 (7th ed. 1903).

And that was the holding of the Court in *Boyd* v. *United States,* 116 U. S. 616, decided in 1886. Mr. Justice Bradley reviewed British history, including *Entick* v. *Carrington, supra,* and American history under the Bill of Rights and said:

> "The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo.* In the one case, the government is entitled to the possession of the property; in the other it is not." *Id.,* at 623.

What Mr. Justice Bradley said about stolen or forfeited goods or contraband is, of course, not accurate if read to mean that they may be seized at any time even without a warrant or not incident to an arrest that is lawful. The right to seize contraband is not absolute. If the search leading to discovery of an illicit article is

not incidental to a lawful arrest or not authorized by a search warrant, the fact that contraband is discovered does not make the seizure constitutional. *Trupiano* v. *United States*, 334 U. S. 699, 705; *McDonald* v. *United States*, 335 U. S. 451; *Henry* v. *United States*, 361 U. S. 98, 103; *Beck* v. *Ohio*, 379 U. S. 89; *Aguilar* v. *Texas*, 378 U. S. 108.

That is not our question. Our question is whether the Government, though armed with a proper search warrant or though making a search incident to an arrest, may seize, and use at the trial, testimonial evidence, whether it would otherwise be barred by the Fifth Amendment or would be free from such strictures. The teaching of *Boyd* is that such evidence, though seized pursuant to a lawful search, is inadmissible.

That doctrine had its full flowering in *Gouled* v. *United States*, 255 U. S. 298, where an opinion was written by Mr. Justice Clarke for a unanimous Court that included both Mr. Justice Holmes and Mr. Justice Brandeis. The prosecution was for defrauding the Government under procurement contracts. Documents were taken from defendant's business office under a search warrant and used at the trial as evidence against him. Stolen or forged papers could be so seized, the Court said; so could lottery tickets; so could contraband; so could property in which the public had an interest, for reasons tracing back to warrants allowing the seizure of stolen property. But the papers or documents fell in none of those categories and the Court therefore held that even though they had been taken under a warrant, they were inadmissible at the trial as not even a warrant, though otherwise proper and regular, could be used "for the purpose of making search to secure evidence" of a crime. *Id.*, at 309. The use of those documents against the accused might, of course, violate the Fifth Amendment. *Id.*, at 311. But whatever may be the intrinsic nature of the evidence,

the owner is then "the unwilling source of the evidence" (*id.*, at 306), there being no difference so far as the Fifth Amendment is concerned "whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers." *Ibid.*

We have, to be sure, breached that barrier, *Schmerber* v. *California*, 384 U. S. 757, being a conspicuous example. But I dissented then and renew my opposing view at this time. That which is taken from a person without his consent and used as testimonial evidence violates the Fifth Amendment.

That was the holding in *Gouled;* and that was the line of authority followed by Judge Simon Sobeloff, writing for the Court of Appeals for reversal in this case. 363 F. 2d 647. As he said, even if we assume that the search was lawful, the articles of clothing seized were of evidential value only and under *Gouled* could not be used at the trial against petitioner. As he said, the Fourth Amendment guarantees the right of the people to be secure "in their persons, houses, papers, and effects, against unreasonable searches and seizures." Articles of clothing are covered as well as papers. Articles of clothing may be of evidential value as much as documents or papers.

Judge Learned Hand stated a part of the philosophy of the Fourth Amendment in *United States* v. *Poller*, 43 F. 2d 911, 914:

> "[I]t is only fair to observe that the real evil aimed at by the Fourth Amendment is the search itself, that invasion of a man's privacy which consists in rummaging about among his effects to secure evidence against him. If the search is permitted at all, perhaps it does not make so much difference what is taken away, since the officers will ordinarily

> not be interested in what does not incriminate, and there can be no sound policy in protecting what does. Nevertheless, limitations upon the fruit to be gathered tend to limit the quest itself . . . ."

The right of privacy protected by the Fourth Amendment relates in part of course to the precincts of the home or the office. But it does not make them sanctuaries where the law can never reach. There are such places in the world. A mosque in Fez, Morocco, that I have visited, is by custom a sanctuary where any refugee may hide, safe from police intrusion. We have no such sanctuaries here. A policeman in "hot pursuit" or an officer with a search warrant can enter any house, any room, any building, any office. The privacy of those *places* is of course protected against invasion except in limited situations. The full privacy protected by the Fourth Amendment is, however, reached when we come to books, pamphlets, papers, letters, documents, and other personal effects. Unless they are contraband or instruments of the crime, they may not be reached by any warrant nor may they be lawfully seized by the police who are in "hot pursuit." By reason of the Fourth Amendment the police may not rummage around among these personal effects, no matter how formally perfect their authority may appear to be. They may not seize them. If they do, those articles may not be used in evidence. Any invasion whatsoever of those personal effects is "unreasonable" within the meaning of the Fourth Amendment. That is the teaching of *Entick* v. *Carrington, Boyd* v. *United States,* and *Gouled* v. *United States.*

Some seek to explain *Entick* v. *Carrington* on the ground that it dealt with seditious libel and that any search for political tracts or letters under our Bill of Rights would be unlawful *per se* because of the First

Amendment and therefore "unreasonable" under the Fourth. That argument misses the main point. A prosecution for seditious libel would of course be unconstitutional under the First Amendment because it bars laws "abridging the freedom of speech, or of the press." The First Amendment also has a penumbra, for while it protects only "speech" and "press" it also protects related rights such as the right of association. See *NAACP* v. *Alabama*, 357 U. S. 449, 460, 462; *Bates* v. *Little Rock*, 361 U. S. 516, 523; *Shelton* v. *Tucker*, 364 U. S. 479, 486; *Louisiana* v. *NAACP*, 366 U. S. 293, 296; and *NAACP* v. *Button*, 371 U. S. 415, 430–431. So it could be held, quite apart from the Fourth Amendment, that any probing into the area of opinions and beliefs would be barred by the First Amendment. That is the essence of what we said in *Watkins* v. *United States*, 354 U. S. 178, 197:

> "Clearly, an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly. While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of lawmaking. It is justified solely as an adjunct to the legislative process. The First Amendment may be invoked against infringement of the protected freedoms by law or by lawmaking."

But the privacy protected by the Fourth Amendment is much wider than the one protected by the First. *Boyd* v. *United States* was a forfeiture proceeding under the customs revenue law and the paper held to be beyond the reach of the Fourth Amendment was an invoice covering the imported goods. 116 U. S., at 617–619, 638. And as noted, *Gouled* v. *United States* involved a prosecution for defrauding the Government under procurement contracts and the papers held protected against

seizure, even under a technically proper warrant, were (1) an unexecuted form of contract between defendant and another person; (2) a written contract signed by defendant and another person; and (3) a bill for disbursement and professional services rendered by the attorney to the defendant. 255 U. S., at 306–307.

The constitutional philosophy is, I think, clear. The personal effects and possessions of the individual (all contraband and the like excepted) are sacrosanct from prying eyes, from the long arm of the law, from any rummaging by police. Privacy involves the choice of the individual to disclose or to reveal what he believes, what he thinks, what he possesses. The article may be a nondescript work of art, a manuscript of a book, a personal account book, a diary, invoices, personal clothing, jewelry, or whatnot. Those who wrote the Bill of Rights believed that every individual needs both to communicate with others and to keep his affairs to himself. That dual aspect of privacy means that the individual should have the freedom to select for himself the time and circumstances when he will share his secrets with others and decide the extent of that sharing.[2] This is his preroga-

[2] This concept of the right of privacy protected by the Fourth Amendment is mirrored in the cases involving collateral aspects of the problem presented in this case:

"It has, similarly, been held that a defendant cannot complain of the seizure of books and papers neither his own, nor in his possession. It is also the well-settled rule that where the papers are public records the defendant's custody will not avail him against their seizure. Where papers are taken out of the custody of one not their owner, it seems that such person can object if there has been no warrant, or if the warrant was directed to him, but not if the warrant is directed to the owner. If the defendant's property is lawfully out of his possession it makes no difference by what means it comes into the Government's hands as there has been no compulsion exercised upon him. But the privilege extends to letters in the mails. The privilege extends to the office as well as the home.

"On the other hand, to enable a person to claim the privilege,

tive not the States'. The Framers, who were as knowledgeable as we, knew what police surveillance meant and how the practice of rummaging through one's personal effects could destroy freedom.

It was in that tradition that we held in *Griswold* v. *Connecticut*, 381 U. S. 479, that lawmakers could not, as respects husband and wife at least, make the use of contraceptives a crime. We spoke of the pronouncement in *Boyd* v. *United States* that the Fourth and Fifth Amendments protected the person against all governmental invasions "of the sanctity of a man's home and the privacies of life." 116 U. S., at 630. We spoke of the "right to privacy" of the Fourth Amendment upheld by *Mapp* v. *Ohio*, 367 U. S. 643, 656, and of the many other controversies "over these penumbral rights of 'privacy and repose.'" 381 U. S., at 485. And we added:

> "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.
>
> "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral

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it is not necessary that he be a party to any pending criminal proceeding. He can object to the illegal seizure of his own property and resist a forcible production of it even if he is only called as a witness.

"Nor must a person be a citizen to be entitled to the protection of the Fourth Amendment. . . ." Fraenkel, Concerning Searches and Seizures, 34 Harv. L. Rev. 361, 375–376.

> loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." *Id.*, at 485–486.

This right of privacy, sustained in *Griswold*, is kin to the right of privacy created by the Fourth Amendment. That there is a zone that no police can enter—whether in "hot pursuit" or armed with a meticulously proper warrant—has been emphasized by *Boyd* and by *Gouled*. They have been consistently and continuously approved.[3] I would adhere to them and leave with the individual the choice of opening his private effects (apart from contraband and the like) to the police or keeping their contents a secret and their integrity inviolate. The existence of that choice is the very essence of the right of privacy. Without it the Fourth Amendment and the Fifth are ready instruments for the police state that the Framers sought to avoid.

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[3] See, *e. g.*, *Carroll* v. *United States*, 267 U. S. 132, 149–150; *United States* v. *Lefkowitz*, 285 U. S. 452, 464–466; *Davis* v. *United States*, 328 U. S. 582, 590, n. 11; *Harris* v. *United States*, 331 U. S. 145, 154; *United States* v. *Rabinowitz*, 339 U. S. 56, 64, n. 6; *Abel* v. *United States*, 362 U. S. 217, 234–235.

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CHICAGO & NORTH WESTERN RAILWAY CO. ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 8. Argued April 19, 1967.—Decided May 29, 1967.*

Eastern and Midwestern railroad carriers filed a complaint with the Interstate Commerce Commission (ICC) seeking higher divisions of joint tariffs on transcontinental freight traffic. In consolidated proceedings, which involved rate divisions affecting about 300 railroads, the carriers voluntarily aligned themselves into three groups, Eastern, Midwestern and Mountain-Pacific, and submitted evidence and tried the case on this group basis. The ICC found the existing divisions unlawful and prescribed increased divisions for the Midwestern and Eastern roads. Relying on a Mountain-Pacific cost study, modified by the ICC in certain respects, the ICC found that the Mountain-Pacific carriers' revenues exceeded service costs by much larger percentages than the revenues of Eastern or Midwestern railroads. In assessing comparative revenue needs, the ICC found that the average rate of return, based on net railway operating income as a percentage of the value of invested property, was 3.40% for the Eastern roads, 3.49% for the Midwestern group, and 4.64% for the Mountain-Pacific carriers. The ICC noted that the fact that net operating income of Mountain-Pacific roads had not increased as fast as net investment in recent years was due primarily to disproportionate passenger deficits that offset favorable freight income. Based on revenue needs and service costs the ICC concluded that there should be increases in the Eastern carriers' divisions, and simply increased their percentages of the existing rates between well-defined subareas in Eastern Territory and points in Transcontinental Territory. The ICC concluded that Midwestern divisions should be increased, finding cost considerations to be the controlling factor. Since the Midwestern-Transcontinental subgroupings were not well-defined, the ICC adopted a weighted mileage basis of appor-

*Together with No. 23, *United States et al.* v. *Atchison, Topeka & Santa Fe Railway Co. et al.*, also on appeal from the same court.

tioning the rates, determined through the use of divisional scales, as suggested by both the Midwestern and Mountain-Pacific carriers. Petitions for reconsideration included requests for special treatment by three roads claiming that the divisions had an unduly harsh effect on them. The ICC issued a supplemental order substantially reaffirming its original order. The District Court, in an action brought by certain Mountain-Pacific carriers, set aside the ICC's orders. The court held that the ICC's findings were insufficient because made on a group basis, that the Interstate Commerce Act required findings on an individual basis with respect to each of the 300 railroads involved, and that the ICC was obliged to determine, in precise dollar amount, the revenue needs of each railroad and the revenue effect on each road of the new divisions. All of the Eastern and some of the Midwestern carriers reached settlement agreements with the Mountain-Pacific roads covering rate divisions affecting them and the remaining dispute mainly concerns divisions between the Mountain-Pacific railroads and eight principal Midwestern carriers. *Held:*

1. The ICC has authority to take evidence and make findings on a group basis. *New England Divisions Case*, 261 U. S. 184. Pp. 340–343.

(a) The "actual necessities of procedure and administration" require proceeding on a group basis in ratemaking and divisions cases involving large numbers of railroads. Pp. 341–342.

(b) The premise that evidence pertaining to a group is typical of its members may be challenged by an individual carrier, which will be accorded independent treatment by the ICC upon proper request. P. 342.

(c) Here the carriers voluntarily aligned themselves into groups and requested new divisions on a group basis. P. 343.

2. The ICC's failure to state the revenue needs of each carrier in terms of precise dollar amount was not error. Pp. 343–351.

(a) The ICC found revenue needs important factors only for the Eastern divisions, and since those divisions are not in issue, the ICC's treatment thereof is no longer relevant. Pp. 344–345.

(b) Assuming that the ICC attached some limited significance to revenue needs in increasing Midwestern divisions, its treatment was not legally inadequate. The use of comparative rates of return, on a value rather than book cost basis, is an appropriate foundation for the exercise of administrative judgment as to relative financial strength. Pp. 345–347.

(c) The question of passenger deficits was of negligible relevance to the ICC's decision to increase Midwestern divisions. Pp. 348–351.

3. In light of the insubstantiality of appellees' attacks on the ICC's conclusions on service costs, which had reasoned foundation and were within the scope of its expert judgment, further District Court proceedings thereon would not be appropriate even though the District Court had not dealt directly with those conclusions and it is not generally this Court's practice to initially review an administrative record. Pp. 351–356.

4. The ICC's "expert discretion" plays a considerable role in the technical area of railroad rate divisions and there was sufficient explanation for its exercise here in devising a special divisional scale designed to produce the moderate increases in Midwestern divisions it found justified by cost evidence. Pp. 356–361.

(a) The remedy the ICC chose was appropriately calculated to achieve moderate overall increases in the Midwestern divisions. Pp. 358–359.

(b) The ICC was not obligated to make precise dollar amount findings of the effect of the new divisions on each of the carriers or carrier groups involved; it was not undertaking to transfer sums of money from Mountain-Pacific carriers to Midwestern roads to meet the latter carriers' revenue needs. Pp. 359–360.

(c) The ICC did not exceed its proper role in weighing and interpreting the evidence when it prescribed a minimum division of 15%. Pp. 360–361.

5. The ICC did not err in its treatment of the three individual carriers which asserted that the divisions prescribed would have an unfair and unduly harsh impact on them. Pp. 361–367.

(a) No carrier has a vested right to divisions it may have negotiated, and the mere fact that the new divisions may cause a net reduction in revenues does not establish their invalidity, especially since it has not been shown that the new divisions do not fairly reflect complainants' cost of service. Pp. 362–363.

(b) At the time of the ICC's orders, the impact of the new divisions on Denver & Rio Grande was uncertain and the voluntary negotiation of subdivisions was available; accordingly the ICC was justified in refusing plenary consideration of the carrier's claims at that time. If the road's ability to provide service is jeopardized it may apply to the ICC for relief. Pp. 363–367.

238 F. Supp. 528, reversed and remanded.

Hugh B. Cox argued the cause for appellants in No. 8. With him on the briefs were *William H. Allen, Nuel D. Belnap, Richard M. Freeman, Bryce L. Hamilton, Raymond K. Merrill* and *Nye F. Morehouse.*

Arthur J. Cerra argued the cause for the United States et al. in No. 23. With him on the brief were *Solicitor General Marshall, Assistant Attorney General Turner, Robert B. Hummel, Jerry Z. Pruzansky* and *Robert W. Ginnane.*

Howard J. Trienens argued the cause for appellees Atchison, Topeka & Santa Fe Railway Co. et al. With him on the brief were *Douglas F. Smith, George L. Saunders, Jr.,* and *Gary L. Cowan. George L. Saunders, Jr.,* argued the cause for appellees Missouri-Kansas-Texas Railroad Co. et al. With him on the brief was *John E. McCullough. Calvin L. Rampton* argued the cause for appellees Arizona Corporation Commission et al. With him on the brief were *Robert Y. Thornton* and *Richard W. Sabin. Cyril M. Saroyan* argued the cause for appellees the State of California et al. With him on the brief were *Mary Moran Pajalich* and *J. Thomason Phelps.*

Walter R. McDonald filed a brief for the Southern Governors' Conference et al., as *amici curiae,* in No. 23.

MR. JUSTICE STEWART delivered the opinion the Court.

This is a controversy between the Mountain-Pacific railroads and certain Midwestern railroads, involving the proper division between them of joint rates from through freight service in which they both participate. Dissatisfied with their share of existing divisions, the Midwestern carriers called upon the Interstate Commerce Commission's statutory authority to determine that joint rate divisions "are or will be unjust, unreasonable, inequitable, or unduly preferential," and to prescribe "just, reasonable,

and equitable divisions" in their place.[1] The Commission found that the existing divisions were unlawful, and established new divisions which, on the average, gave the Midwestern carriers a greater share of the joint rates.[2] The District Court set aside the Commission's order on the ground that certain of its findings were deficient.[3] We noted probable jurisdiction, 383 U. S. 964, to consider important questions regarding the Commission's powers and procedures raised by the District Court's decision.

I.

There were originally three groups of railroads involved in the proceedings before the Commission: the Eastern, Midwestern, and Mountain-Pacific carriers. The Eastern railroads operate in the northeastern area of the United States extending south to the Ohio River and parts of Virginia and west to central Illinois. Midwestern Territory lies between Eastern Territory and the Rocky Mountains, and the rest of the United States to the west constitutes Mountain-Pacific Territory. The latter is subdivided into Transcontinental Territory—comprising the States bordering the Pacific, Nevada, Arizona, and parts of Idaho, Utah, and New Mexico—and Intermountain Territory. The railroads operating in Southern Territory, which includes the southeastern United

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[1] Interstate Commerce Act, § 15 (6), 41 Stat. 486, 49 U. S. C. § 15 (6). See also § 1 (4) of the Act, 54 Stat. 900, 49 U. S. C. § 1 (4), which provides, in pertinent part, that: "It shall be the duty of every . . . common carrier establishing through routes . . . in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

[2] 321 I. C. C. 17, 322 I. C. C. 491.

[3] 238 F. Supp. 528.

States, were not involved in the proceedings before the Commission.[4]

Railroads customarily establish joint through rates for interterritorial freight service, and the divisions of these rates, fixed by the Commission or by agreement, determine what share of the joint tariffs each of the several participating carriers receives. See *St. Louis S. W. R. Co.* v. *United States*, 245 U. S. 136, 139–140, n. 2. In 1954 the Eastern carriers filed a complaint with the Commission seeking a greater share of the joint tariff on freight traffic east and west between Eastern Territory and Transcontinental Territory. Shortly thereafter, the Midwestern carriers also filed a complaint, requesting higher divisions on (1) their intermediate service on Eastern-Transcontinental traffic, (2) their service on freight traffic east and west between Midwestern Territory and Transcontinental Territory. Some of the Midwestern lines had long believed that the Mountain-Pacific carriers enjoyed an unduly high share of the joint tariffs for these categories of traffic. When joint rates for traffic to the western United States were first established in the 1870's, rates were divided on the basis of the miles of carriage rendered by the participating railroads, but the Mountain-Pacific carriers enjoyed a 50% inflation in their mileage factor.[5] In 1925, after

[4] Certain Southern carriers did participate in some of the proceedings before the Commission in relation to service they perform in Eastern Territory. And the Southern Governors' Conference and the Southeastern Association of Railroad and Utilities Commissioners, parties in pending litigation involving divisions between Southern and Eastern Territory, filed an *amicus* brief here.

[5] Assume a carriage of 1,000 miles by a Mountain-Pacific road and 500 miles by Midwestern carrier. On a straight mileage basis of dividing the joint rate fare, the Mountain-Pacific carrier would receive two-thirds of the fare and the Midwestern road one-third.

the Commission had begun, but not yet completed, an investigation of the existing divisions, the Mountain-Pacific carriers agreed to modest increases in the Midwestern railroads' share of joint rates. The divisions between Mountain-Pacific and Midwestern carriers have remained unchanged since that time.[6]

In the proceedings before the Commission, which consolidated the Eastern and the Midwestern complaints, the Mountain-Pacific railroads not only defended the existing divisions, but sought a 10% increase in their share. Regulatory commissions of States in Mountain-Pacific Territory also intervened. The consolidated proceedings involved rate divisions affecting about 300 railroads, which voluntarily aligned themselves into three groups—Eastern, Midwestern, and Mountain-Pacific—and submitted evidence and tried the case on this group basis. A great deal of time was consumed in compiling and introducing massive amounts of evidence—more than 800 exhibits and over 11,200 pages of testimony. The Hearing Examiners made a recommended report in 1960. After considering written briefs and oral arguments from the various groups of parties, the Commission issued its original report in March of 1963. The Commission found the existing divisions to be unlawful, and prescribed

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Under the system described in the text, the Mountain-Pacific carrier would be credited with 1,500 miles of carriage and the Midwestern line 500. They would accordingly divide the joint fare on a three-fourths–one-fourth basis.

[6] In 1929, the Commission undertook another investigation of the Midwestern-Transcontinental divisions. In 1934, on the basis of a record it termed "most unsatisfactory," the Commission concluded that "we are unable to find that the divisions of the transcontinental rates are unlawful." *Divisions of Freight Rates*, 203 I. C. C. 299, 335. In the present proceeding, the Commission stated that the weight to be ascribed its 1934 decision was a question "of little moment . . . in view of changes which have occurred in the intervening years." 321 I. C. C. 17, 72.

increased divisions for the Midwestern and Eastern carriers, effective July 1, 1963.

When exercising its statutory authority to establish "just and reasonable" divisions under § 15 (6) of the Interstate Commerce Act, the Commission is required to:

> "[G]ive due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge." [7]

After reviewing the nature of the traffic involved and considering the special claims of the various groups, the Commission found that "none of the contending groups is more or less efficiently operated than another," and that "there are no differences in the importance to the public attributable to the three contending groups of carriers." Its decision thus turned on more direct financial considerations, to which the Commission devoted a substantial part of its lengthy report. Under Commission practice, these financial considerations are divided into "cost of service" and "revenue needs." The former consists of the out-of-pocket expenses directly associated with a particular service, including operating costs, taxes, and a four percent return on the property involved.

[7] Interstate Commerce Act, § 15 (6), 41 Stat. 486, 49 U. S. C. § 15 (6).

"Revenue needs" refers to broader requirements for funds in excess of out-of-pocket expenses, including funds for new investment.

In determining cost of service, the Commission relied upon a cost study prepared by the Mountain-Pacific railroads, but introduced certain modifications that produced different results. The Commission found that existing divisions on Eastern-Transcontinental traffic gave the Mountain-Pacific carriers revenues that exceeded their costs by 57%, while the Midwestern and Eastern railroads received only 43% and 22% more, respectively, than their costs for the service they contributed. On Midwestern-Transcontinental traffic, the Commission found that the divisions gave the Mountain-Pacific carriers revenues 71% above cost, while the Midwestern lines received only 39% above cost; on this traffic the Midwestern railroads bore 31.5% of the total cost but received only 27.1% of the total revenue.

In assessing comparative revenue needs, the Commission found that the average rate of return for 1946–1958, based on net railway operating income from all services as a percentage of the value of invested property,[8] was 3.40% for the Eastern roads, 3.49% for the Midwestern group, and 4.64% for the Mountain-Pacific carriers. The Commission also found that the Mountain-Pacific railroads had the most favorable record and trend in both freight volume and freight revenues, and the Eastern railroads the least favorable, with the Midwestern roads occupying an intermediate position. In response to the Mountain-Pacific carriers' complaint that their net operating income from all services had not increased as fast as net investment in recent years, the Commission

[8] The value of the investment base was determined for this purpose by the valuations of railroad property made by the Commission's Bureau of Valuation.

noted that this was primarily due to disproportionate passenger deficits that offset favorable income from freight services. The Commission also discounted the contention that the Mountain-Pacific carriers were entitled to greater revenues to provide funds for new investment, finding that the needs of the various carrier groups for such funds were not appreciably different. The claim of the Midwestern carriers that they had the most pressing need for revenues was also rejected by the Commission.

From all this evidence, the Commission concluded "that there should be increases in [the Eastern carriers'] divisions reflecting revenue need as well as cost." While the very poor financial position and high revenue needs of the Eastern carriers were thus important elements in prescribing increases in their divisions, the Commission went on to find cost considerations the controlling factor with regard to the Midwestern divisions: "As between the [Mountain-Pacific railroads] and the [Midwestern] railroads the differences in earning power are less marked, but our consideration of the evidence bearing on cost of service previously discussed convinces us that the primary midwestern divisions as a whole are too low."

In establishing higher divisions for the Eastern carriers, the Commission relied upon the existing percentages governing divisions of the various rates between well-defined subareas in Eastern Territory and points in Transcontinental Territory. The Commission simply increased the percentages that the Eastern carriers formerly received on this traffic.[9] However, the Commission concluded that it could not follow this procedure

[9] Thus, for carriage between the Buffalo-Pittsburgh area to points on or near the Pacific coast, with interchange at Chicago, the Commission provided that the Eastern carrier should receive 22% of the joint fare, leaving the remaining 78% to be divided between carriers providing service west of Chicago.

with respect to Midwestern divisions on Eastern-Transcontinental and Midwestern-Transcontinental traffic. It found that Midwestern-Transcontinental subgroupings were not well-defined and were in some cases not properly related to distance. Thus it was not feasible to assemble rates from various Midwestern points to Transcontinental points into common groups and apply fixed percentage divisions to each group in order to determine the respective shares of the Midwestern and Mountain-Pacific carriers. Instead, the Commission resorted to a weighted mileage basis of apportionment, determined through the use of divisional scales. The Commission has frequently used such scales in the past, and their use in this case was suggested by both the Midwestern and Mountain-Pacific carriers. Under the system adopted, the mileage contributed by each carrier to the joint service is broken down into 50-mile blocks. The scale chosen assigns each block a number. A large number is assigned the first block, and a smaller number to successive 50-mile increments; this is designed to reflect terminal and standby costs incurred regardless of the length of carriage contributed. Each carrier then receives a share of the joint revenue in proportion to the sum of scale numbers corresponding to its mileage contribution. To determine the divisions between the Midwestern and Mountain-Pacific carriers, the Commission used a 29886 scale—so named because it was developed in another interterritorial divisions case bearing that docket number.[10] This scale assigns a factor of 65 to the first 50-mile block of carriage and a factor of 12 to each successive 50-mile increment.[11] The Commission decided that the Midwestern carriers' shares would be determined by an unadjusted 29886 scale, but that the Mountain-Pacific

[10] *Official-Southwestern Divisions*, 287 I. C. C. 553.

[11] A few of the 50-mile increments enjoy a factor of 13. See table, n. 13, *infra*.

carriers' shares should be based on the same scale with the mileage factors inflated by 10% to reflect certain greater costs of carriage in the mountainous West. Thus, for their carriage, the Mountain-Pacific carriers would enjoy a factor of 72 for the first 50-mile block, and a factor of 13 for successive 50-mile increments.[12] For any joint carriage, the Midwestern and Mountain-Pacific carriers would translate their mileage contributions into scale numbers, and divide the proceeds in proportion to the numbers so obtained.[13] The divisions thus essentially

[12] Some of the 50-mile increments enjoy factors of 14 or 15. See table, n. 13, *infra*.

[13] The scale prescribed by the Commission is as follows:

SCALES OF DIVISIONAL FACTORS.

Miles	*One*	*Two*	*Three*	*Miles*	*One*	*Two*	*Three*
50	65		72	1,100	318	292	350
100	77		85	1,150	330	304	363
150	89		98	1,200	342	316	376
200	101	75	111	1,250	354	328	389
250	113	87	124	1,300	367	341	404
300	125	99	138	1,350	379	353	417
350	137	111	151	1,400	391	365	430
400	149	123	164	1,450	403		443
450	161	135	177	1,500	415		457
500	174	148	191	1,550	427		470
550	186	160	205	1,600	439		483
600	198	172	218	1,650	451		496
650	210	184	231	1,700	463		509
700	222	196	244	1,750	475		523
750	234	208	257	1,800	487		536
800	246	220	271	1,850	499		549
850	258	232	284	1,900	511		562
900	270	244	297	1,950	523		575
950	282	256	310	2,000	535		589
1,000	294	268	323	2,050	547		602
1,050	306	280	337	2,100	559		615

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Column Three provides the factor for the Mountain-Pacific haul. Column One provides the Midwestern factor on Midwestern-

reflect a mileage basis, with disproportionate weight assigned the first 50 miles of carriage and an overall inflation factor favoring the Mountain-Pacific carriers. The Commission found that the net effect of its revised scale would be to "produce moderate increases in some of the most important midwestern divisions."

After entertaining petitions for reconsideration, the Commission adopted a supplemental report in late 1963. For the first time, a few carriers abandoned the three-group basis on which all the prior proceedings had been conducted. Requests for special treatment were made on behalf of one Mountain-Pacific road, the Denver & Rio Grande, and two Midwestern carriers, the Missouri-Kansas-Texas (Katy) and the St. Louis-San Francisco (Frisco), on the ground that the divisions prescribed by the Commission had an unduly harsh effect on them.[14] The Commission considered and largely rejected these and other criticisms of its original decision, and issued a supplemental order substantially reaffirming its original order after making minor technical modifications.

Eleven of the Mountain-Pacific carriers brought an action in the District Court to enjoin and set aside

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Transcontinental traffic, and Column Two the Midwestern factor for Eastern-Transcontinental traffic. Column Two also applies to subdivisions of carriage in Midwestern Territory.

To illustrate the operation of the scale, assume a carriage of 1,000 miles in Midwestern Territory by a Midwestern railroad and an additional carriage by a Mountain-Pacific road of another 1,000 miles in Mountain-Pacific Territory. Column One gives the Midwestern carrier a factor of 294, and Column Three assigns the Mountain-Pacific railroad a factor of 323. The sum of the factors is 617. The Midwestern carrier would receive 294/617, or 48% of the joint rate, and the Mountain-Pacific carrier 323/617, or 52% of the rate.

[14] Certain individual contentions were also made by the Wabash Railroad on petition for reconsideration before the Commission, but they are no longer part of the issues in these cases (hereafter referred to as this case).

the Commission's orders and succeeded in obtaining preliminary injunctions. Other Mountain-Pacific carriers, the western state regulatory commissions, and the Katy and the Frisco intervened as plaintiffs, while the Eastern carriers and a group of Midwestern railroads intervened on the side of the Government and the Commission as defendants. In January 1965 the District Court handed down the decision setting aside the Commission's orders. The court held that the findings made by the Commission with regard to the revenue need, cost of service, public importance, etc., of the Eastern, Midwestern, and Mountain-Pacific carriers were insufficient because they were made on a group basis. In the view of the District Court, the Interstate Commerce Act required the Commission to make such findings with respect to each of the 300 railroads involved, on an individual basis. The District Court further held that in a divisions case the Commission is obliged to determine, in precise dollar amount, the revenue needs of each individual railroad, and also the revenue effect on each individual railroad, again in precise dollar amount, of the new divisions that the Commission establishes. The District Court in conclusion stated:[15]

> "[T]hat to comply with . . . the Interstate Commerce and the Administrative Procedure Acts . . . the Commission is required to make affirmative findings which disclose that the requirements of Section 15 (6) have been met and the factors therein required have been determined and considered, not only as to the groups of roads involved but with respect to each carrier affected in said groups; that findings must be made as to the amount of revenue, in terms of dollars, required by the respective carriers affected in any new divisions prescribed, the financial effect of the Commission's orders in terms of dollars as to

[15] 238 F. Supp., at 539.

the carriers and the extent to which the new divisions prescribed will produce the revenue found to be required . . . ."

The Eastern carriers, the Midwestern defendants, and the Government and the Commission all appealed the decision of the District Court. Thereafter, all of the Eastern and some of the Midwestern carriers [16] reached settlement agreements with the Mountain-Pacific carriers covering the rate divisions affecting them. We accordingly vacated the judgment of the District Court with respect to the divisions of the Eastern and the settling Midwestern railroads, and remanded the relevant portions of the appeals to the District Court with instructions to dismiss as moot. 383 U. S. 832, 384 U. S. 888. Thus, the principal dispute remaining concerns the divisions between the Mountain-Pacific carriers and the eight principal Midwestern roads that are appellants in No. 8.[17]

II.

None of the appellees now defends the position, espoused by the District Court, that the Commission was required to make separate individual findings for each of the 300 railroads involved in the proceedings before it.

[16] The nonsettling Midwestern railroads include the eight appellants in No. 8, the Chicago & North Western, the Chicago Great Western, the Chicago, Milwaukee, St. Paul & Pacific, the Green Bay and Western, the Gulf, Mobile & Ohio, the Illinois Central, the Missouri Pacific, and the Soo Line, and 45 of their short-line connections.

[17] Also involved are subdivisions in Midwestern Territory between the Midwestern appellants and the settling Midwestern roads. Furthermore, five of the Midwestern appellants operate in a small part of Eastern Territory, comprising southeastern Illinois and a few areas in Indiana. The Eastern divisions are applicable to some of these operations, but the only active issue between the appellants and the Mountain-Pacific roads relating to these divisions is a 15% minimum division prescribed by the Commission and discussed in Part V of this opinion.

But the error in that position, which rejects over 40 years of consistent administrative practice, requires comment.

In its first decision involving rate divisions under § 15 (6), the *New England Divisions Case,* 261 U. S. 184, the Court upheld the authority of the Commission to take evidence and make findings on a group basis. Speaking for a unanimous Court, Mr. Justice Brandeis noted that the "actual necessities of procedure and administration" required procedures on a group basis in ratemaking cases, and that a similar practice was appropriate in divisions cases. The complexity of the subject matter and the multiplicity of carriers typically involved in divisions cases were such that a wooden requirement of individual findings would make effective regulation all but impossible. The Court held that the Interstate Commerce Act permits the Commission to proceed on a group basis and to rely on "evidence which the Commission assumed was typical in character, and ample in quantity" to justify its findings, reasoning that:

> "Obviously, Congress intended that a method should be pursued by which the task, which it imposed upon the Commission, could be performed. . . . To require specific evidence, and separate adjudication, in respect to each division of each rate of each carrier, would be tantamount to denying the possibility of granting relief. We must assume that Congress knew this . . . ." 261 U. S., at 196–197.

Both the Court [18] and the Commission [19] have consistently adhered to this construction of the Act's require-

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[18] *Beaumont, S. L. & W. R. Co.* v. *United States,* 282 U. S. 74; *B. & O. R. Co.* v. *United States,* 298 U. S. 349; *Boston & Maine R. Co.* v. *United States,* 371 U. S. 26, affirming 208 F. Supp. 661.

[19] *E. g., Southwestern-Official Divisions,* 234 I. C. C. 135; *Divisions of Rates, Official and Southern Territories,* 234 I. C. C. 175; *Official Western Trunk Line Divisions,* 269 I. C. C. 765; *Official-*

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ments, and its rejection by the District Court in this case was error.[20]

The pragmatic justifications for the Commission's group procedures are obvious. Even on a group basis, the Commission proceedings in this case required a voluminous record and were not completed until nearly 10 years after the complaints were filed. To demand individual evidence and findings for each of the 300 carriers in the Commission proceedings would so inflate the record and prolong administrative adjudication that the Commission's regulatory authority would be paralyzed.

Nor do considerations of fairness require disregard of administrative necessities. The premise of group proceedings, as the *New England Divisions Case* explicitly recognized, is that evidence pertaining to a group is typical of its individual members. 261 U. S., at 196–199. See also *Beaumont, S. L. & W. R. Co.* v. *United States*, 282 U. S. 74, 82–83. It has always been accepted that an individual carrier may challenge this premise and, on proper showing, receive independent consideration if its individual situation is so atypical that its inclusion in group consideration would be inappropriate. It is the Commission's practice to accord independent treatment to an individual carrier when a proper request for special consideration is made.[21] But no such requests were made

Southern Divisions, 287 I. C. C. 497; *Official-Southwestern Divisions*, 287 I. C. C. 553, 289 I. C. C. 11; *Official-Southern Divisions*, 325 I. C. C. 1.

[20] We cannot accept the notion that the Administrative Procedure Act, 60 Stat. 237, as amended, 5 U. S. C. §§ 551–559 (1964 ed. Supp. II), overruled these established precedents and imposed a requirement of individual findings upon the Commission.

[21] For example, in *Official-Southern Divisions*, 325 I. C. C. 1, 449, the Commission undertook separate consideration and prescribed special divisions for the Norfolk Southern Railroad after that carrier had disassociated itself from its geographical group and presented evidence on an individual basis.

during the hearings and presentation of evidence in this case. Instead, the individual carriers voluntarily aligned themselves into groups, presented evidence and tried the case on a group basis, and asked the Commission to prescribe new divisions on a group basis. In this situation, the Commission was not obliged on its own motion to demand evidence and make findings on an individual basis. Departure from the practicalities of group procedure is justified only when there is a real need for separate treatment of a given carrier; the individual carriers themselves, which have the closest understanding of their own situation and interests, are normally the appropriate parties to show that such need exists.

The Denver & Rio Grande, the Katy, and the Frisco did request independent consideration in petitions for reconsideration of the Commission's original decision. Their claims will be discussed below in Part VI of this opinion, but it should be noted that at no point during the administrative hearings or the presentation of evidence did they raise any claim for separate treatment. Moreover, their contention basically is not that the group evidence or findings were unrepresentative, but rather that the divisions prescribed by the Commission have an unduly harsh impact on them. Even if it were assumed that the Commission's disposition of this contention was erroneous, that would be no ground for requiring the Commission to make individual findings for the rest of the 300 carriers involved.

III.

Among the errors that the District Court found in the Commission's decision was its failure to state the revenue needs of each individual carrier in terms of precise dollar amount. While not defending the requirement of individual findings, the appellees do contend that the Commission was required to determine the revenue needs of

the various carrier groups in precise dollar amount, and they also urge other errors in the Commission's treatment of revenue needs. We believe, however, that in the case's present posture these criticisms are largely misdirected.

In increasing the shares of the Eastern railroads the Commission did rely on revenue needs as well as costs, but it found costs alone the controlling factor in raising the divisions of the Midwestern carriers. In the conclusions in its original report, the Commission stated that there should be increases in the Eastern divisions "reflecting revenue need as well as cost," but in the very next sentence it went on to say that as between the Midwestern and Mountain-Pacific roads, "differences in earning power are less marked, but our consideration of the evidence bearing on cost of service previously discussed convinces us that the primary midwestern divisions as a whole are too low." Its reliance on costs alone in increasing the Midwestern shares is confirmed by the Commission's supplemental report, in which it again rejected a request of the Midwestern carriers for even higher divisions based on their claim of pressing revenue needs: "It was our stated view that [increases in the Midwestern divisions] were supported by the evidence concerning cost of service, but that the proposal of the midwestern lines gave undue weight to their claimed revenue need." [22] Since revenue needs were important factors only with regard to the Eastern divisions, and those divisions are no longer in issue because the Eastern roads have settled with the Mountain-Pacific carriers, any errors committed by the Commission in its treat-

[22] That the Commission based its increase of the Midwestern divisions on costs is further indicated by its rejection, in its original report, of divisional scales proposed by the Mountain-Pacific carriers on the ground that they were based on studies which "understate the costs of the midwestern lines."

ment of revenue needs are no longer relevant.[23] But even assuming that the Commission did attach some limited significance to revenue needs in raising the Midwestern divisions, we cannot conclude that its treatment of revenue needs was legally inadequate. The Commission devoted over 25 pages of its reports to revenue needs. It discussed at length the proper basis for computing rates of return and found the rates of return for the various carrier groups; it also examined the record and trends in net railway operating income from all services, and from freight and passenger services considered separately.

The Commission placed considerable emphasis on rates of return in its discussion of comparative revenue needs. Following its established practice, it found that a value basis, rather than book cost, as urged by the Mountain-Pacific roads, was the proper method for calculating the investment base.[24] The evidence disclosed that the Mountain-Pacific lines had enjoyed a 4.64% return, as opposed to 3.40% for the Eastern lines, and 3.49% for the Midwestern lines. The suggestion that these findings in terms of rate of return were insufficient because they did not express revenue needs in terms of absolute dollar amount is totally novel and unreasonable. This suggestion seems to stem from a misconception of the Commission's function in divisions cases. Its task is not to transfer lump sums of cash from one carrier to another, but to "make divisions that colloquially may be said to be fair." *B. & O. R. Co.* v. *United States*, 298

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[23] The Eastern divisions do apply to some service by five of the Midwestern appellants in a small part of Eastern Territory, but the only active issue with regard to these divisions is whether the Commission's minimum 15% divisions are justified by the evidence on cost. See n. 17, *supra*.

[24] See n. 8, *supra*.

U. S. 349, 357.[25] The relative financial strength of the carriers involved is a key factor in this task, see the *New England Divisions Case*, 261 U. S. 184, 189–192, and the use of comparative rates of return is an obviously appropriate basis for the exercise of administrative judgment. Rates of return are a familiar tool of analysis in the financial community. The Commission has long relied on this form of analysis in divisions cases,[26] and in passing on the Commission's performance in such cases, this Court has never suggested that ultimate findings of revenue need in terms of absolute dollar amount were required.[27] Appellees are unable to suggest any clear

[25] As the Court observed in *ICC* v. *Hoboken R. Co.*, 320 U. S. 368, 381, "The prescription of divisions where carriers are unable to agree is not a mere partition of property. It is one aspect of the general rate policy which Congress has directed the Commission to establish and administer in the public interest." See also the *New England Divisions Case*, 261 U. S. 184, 195.

[26] *E. g.*, *New England Divisions*, 66 I. C. C. 196, 202; *Alabama & Mississippi R. Co.* v. *A., T. & S. F. R. Co.*, 95 I. C. C. 385, 402–403; *Divisions of Freight Rates*, 148 I. C. C. 457, 476; *Atlantic Coast Line R. Co.* v. *Arcade & A. R. Co.*, 194 I. C. C. 729, 752–755, 198 I. C. C. 375, 382–384; *Divisions of Freight Rates*, 203 I. C. C. 299, 328, 342; *Southwestern-Official Divisions*, 216 I. C. C. 687, 701–702, 739; *Southwestern-Official Divisions*, 234 I. C. C. 135, 146, 148; *Official-Southern Divisions*, 287 I. C. C. 497, 503–504; *Official-Southwestern Divisions*, 287 I. C. C. 553, 564, 289 I. C. C. 11, 12.

[27] *Beaumont, S. L. & W. R. Co.* v. *United States*, 282 U. S. 74; *B. & O. R. Co.* v. *United States*, 298 U. S. 349; *Boston & Maine R. Co.* v. *United States*, 371 U. S. 26, affirming 208 F. Supp. 661. Cf. *New York* v. *United States*, 331 U. S. 284, 329, 347–349.

Chicago, M., St. P. & P. R. Co. v. *Illinois*, 355 U. S. 300, relied upon by the appellees, is not apposite. There the Court upheld the District Court in setting aside an order of the Commission made under § 13 (4) of the Interstate Commerce Act, 24 Stat. 383, as amended, 49 U. S. C. § 13 (4). The Commission had ordered increases in fares on an intrastate passenger run made by the Milwaukee Road, on the ground that existing fares did not cover

regulatory purpose that would be served by such findings. We decline now to impose upon the Commission a rigid mechanical requirement that is without foundation in precedent, practice, or policy.

Appellees, especially the regulatory commissions, vigorously contend that reliance on rates of return showing the Mountain-Pacific carriers in a heavily favorable position was inappropriate because the Commission overlooked the Mountain-Pacific carriers' disproportionate need for funds for new investment. It might be questioned whether forcing carriers in other parts of the country to accept divisions lower than those to which they would otherwise be entitled is a sensible means of raising funds for new investment in the Far West. But the Commission did not reach this issue because it found that the Mountain-Pacific carriers did not in fact have

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operating and indirect costs and thus constituted an "undue, unreasonable, or unjust discrimination" against the Milwaukee Road's interstate operations. The Court held that the Commission erred in comparing the costs and revenues of the particular intrastate service involved instead of all the Milwaukee Road's intrastate operations in Illinois taken together. In a footnote, the Court also stated that it agreed with the District Court's holding that the Commission had not satisfactorily explained how it derived the figure of $77,000 as the commuter service's proper share of indirect costs. 355 U. S., at 309–310, n. 8. It did not hold that in any consideration of revenue need the Commission must make findings in precise dollar amount, but that when it does make precise dollar findings as the basis for raising intrastate fares, it must explain how they were derived. Moreover, different issues are involved in an intrastate fare case and a rate divisions case, and in the former context this Court has noted that the Commission's exercise of its § 13 (4) power must be scrutinized "with suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear." *Florida* v. *United States*, 282 U. S. 194, 211–212. See also *Pub. Service Comm'n* v. *United States*, 356 U. S. 421, 425–426.

a greater need for investment funds than railroads elsewhere:

> "We are unable to agree with the [Mountain-Pacific carriers] and [the regulatory commissions] that the public interest warrants increases in the divisions of the mountain-Pacific railroads in order to provide a source of investment funds required for enlarged facilities commensurate with industrial development in that region. The railroads in all sections of the country are faced with the continuing necessity of raising funds for additions and betterments and new equipment, and we cannot recognize any difference in the degree of this urgency among the territorial groups."

The appellees have sought to convince us that this finding is factually incorrect, but we decline to invade the administrative province and second-guess the Commission on matters within its expert judgment. *B. & O. R. Co.* v. *United States,* 298 U. S. 349, 359; *Alabama G. S. R. Co.* v. *United States,* 340 U. S. 216, 227–228.

The appellees also contend that the Commission erred in its treatment of passenger deficits. In discussing revenue needs, the Commission pointed out that since 1950–1952 the Mountain-Pacific carriers had enjoyed substantial increases in operating revenue from freight services, while the freight revenue of the Eastern carriers had declined. It also noted that the Midwestern carriers' freight revenues had remained relatively constant, and concluded that these comparative trends were likely to continue. The Mountain-Pacific carriers, however, complained that, despite their favorable trend in freight revenues and large amounts of new investment that they had recently made, their rate of return from all services had declined. In reply, the Commission observed that the Mountain-Pacific carriers' passenger deficits had increased

substantially since 1950–1952 and had offset their impressive performance in freight revenues.

The Mountain-Pacific roads now argue that the Commission's decision to increase the Midwestern divisions was based almost exclusively on its treatment of Mountain-Pacific passenger deficits. They further contend that this treatment was invalid on the grounds that it constituted unfair procedural surprise, that the statute does not permit the Commission to differentiate railroads' performance as freight carriers and passenger carriers when it assesses revenue needs in a freight rate divisions case, and that the Commission erred in assuming that, because their statistical passenger deficits had increased, the Mountain-Pacific carriers were capable of making a real improvement in their overall performance by reducing passenger service.

We regard the assumption that the Commission attached great importance to Mountain-Pacific passenger deficits in raising the Midwestern divisions as fanciful. As we have already noted, those increases were based exclusively or almost entirely on cost considerations. To the extent the Commission may have relied on comparative revenue needs, passenger deficits were not a significant factor. The discussion of passenger deficits in the Commission's original report occurred primarily in the context of comparing the revenue needs of the Mountain-Pacific carriers with those of the Eastern roads, when the Commission emphasized that the Eastern railroads had been much more successful in curbing losses on passenger service than the Mountain-Pacific carriers. Any error in the Commission's treatment of passenger deficits prejudiced the Midwestern as well as the Mountain-Pacific carriers, for in rejecting a Midwestern revenue needs argument in its supplemental report, the Commission noted that the Midwestern carriers had also done a much poorer job than the Eastern carriers in

a greater need for investment funds than railroads elsewhere:

> "We are unable to agree with the [Mountain-Pacific carriers] and [the regulatory commissions] that the public interest warrants increases in the divisions of the mountain-Pacific railroads in order to provide a source of investment funds required for enlarged facilities commensurate with industrial development in that region. The railroads in all sections of the country are faced with the continuing necessity of raising funds for additions and betterments and new equipment, and we cannot recognize any difference in the degree of this urgency among the territorial groups."

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substantially since 1950–1952 and had offset their impressive performance in freight revenues.

The Mountain-Pacific roads now argue that the Commission's decision to increase the Midwestern divisions was based almost exclusively on its treatment of Mountain-Pacific passenger deficits. They further contend that this treatment was invalid on the grounds that it constituted unfair procedural surprise, that the statute does not permit the Commission to differentiate railroads' performance as freight carriers and passenger carriers when it assesses revenue needs in a freight rate divisions case, and that the Commission erred in assuming that, because their statistical passenger deficits had increased, the Mountain-Pacific carriers were capable of making a real improvement in their overall performance by reducing passenger service.

We regard the assumption that the Commission attached great importance to Mountain-Pacific passenger deficits in raising the Midwestern divisions as fanciful. As we have already noted, those increases were based exclusively or almost entirely on cost considerations. To the extent the Commission may have relied on comparative revenue needs, passenger deficits were not a significant factor. The discussion of passenger deficits in the Commission's original report occurred primarily in the context of comparing the revenue needs of the Mountain-Pacific carriers with those of the Eastern roads, when the Commission emphasized that the Eastern railroads had been much more successful in curbing losses on passenger service than the Mountain-Pacific carriers. Any error in the Commission's treatment of passenger deficits prejudiced the Midwestern as well as the Mountain-Pacific carriers, for in rejecting a Midwestern revenue needs argument in its supplemental report, the Commission noted that the Midwestern carriers had also done a much poorer job than the Eastern carriers in

halting the swell of passenger deficits. Furthermore, the Commission did not ignore the overall financial strength of the various groups of carriers, but found that the Mountain-Pacific carriers' rate of return from all services was substantially higher than that of either the Midwestern or Eastern carriers.

The claim of unfair surprise is strained in light of the fact that the Commission has frequently differentiated passenger and freight revenues in freight rate division cases.[28] While passenger deficits did not become an important issue in this case until the report of the Hearing Examiners was handed down, the Commission relied upon statistics which were matters of public record, and the Mountain-Pacific carriers had ample opportunity to debate the issue in their exceptions to the Hearing Examiners' report and their petitions for reconsideration of the Commission's original decision. And while the Commission has sometimes acted to offset passenger deficits in freight rate cases,[29] the issues are quite different when, in a divisions case, it is argued that carriers in one part of the country should subsidize the passenger operations of carriers elsewhere.

If the Commission were to give controlling weight to passenger deficits in a divisions case, it might be appropriate to take more evidence on the issue and discuss it in greater depth than the Commission did here. But in light of the fact that, in this case, passenger deficits were of negligible relevance to the Commission's decision to

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[28] *Divisions of Freight Rates*, 148 I. C. C. 457, 474–475; *Atlantic Coast Line R. Co.* v. *Arcade & A. R. Co.*, 194 I. C. C. 729, 753, 755; *Southwestern-Official Divisions*, 216 I. C. C. 687, 698, 708; *Florida East Coast R. Co.* v. *Atlantic Coast Line R. Co.*, 235 I. C. C. 211, 236–237; *Official Western Trunk Line Divisions*, 269 I. C. C. 765, 772; *Gardner* v. *Akron, C. & Y. R. Co.*, 272 I. C. C. 529, 573–577.

[29] *E. g.*, *Increased Freight Rates, 1948*, 276 I. C. C. 9, 35. See also *King* v. *United States*, 344 U. S. 254, 263–264.

increase the Midwestern divisions, we find no errors in the Commission's findings and procedure on this point that would justify setting aside its order.

IV.

Rejection of the appellees' attacks on the Commission's treatment of revenue needs does not exhaust their arsenal. For they argue that the Commission's findings on costs, which were the basis of its decision to raise the Midwestern divisions, were also infected with serious error.

All are agreed that the relevant costs are those of the Eastern-Transcontinental and Midwestern-Transcontinental freight traffic to which the divisions apply. But throughout the proceedings there has been sharp dispute as to the proper method of ascertaining these costs. At the beginning of the administrative hearings, the Midwestern and Eastern carriers relied principally on the Commission's standard Rail Form A, a formulation based on average freight data which, as the Commission noted, "has been widely used as an acceptable means of comparing relative transportation costs." The Mountain-Pacific carriers took the position that Rail Form A, based on averages of all freight service, was not a proper yardstick for measuring the costs of the particular traffic involved in the contested divisions, which, they maintained, had certain distinctive characteristics. The Mountain-Pacific roads prepared their own cost system, based upon a study of this traffic. The Midwestern and Eastern lines responded with other material, and the Midwestern carriers conducted their own special study of line-haul services. Disputes over the applicability of Rail Form A and the various approaches urged by the parties occupied a large part of the administrative proceedings. As the Commission observed:

> "The evidence pertaining to the cost studies of the [Mountain-Pacific carriers] and the midwestern lines

> was extensive. In addition to the detailed testimony of the cost analysts who planned the studies and supervised their compilation, evidence was presented by many other witnesses concerned with operating, statistical, engineering, and mathematical aspects of the projects. In criticism of the studies the [Eastern carriers] and the midwestern lines also introduced detailed evidence of the same general nature and considerable bulk."

After carefully considering this evidence, the Commission decided to base its cost findings on the special cost study and analysis prepared by the Mountain-Pacific carriers. However, it made certain adjustments in the Mountain-Pacific analysis which, in the judgment of the Commission, more accurately reflected the true costs of the traffic involved.

The Commission substituted its own ratio for empty-car returns, derived from Rail Form A, for that devised by the Mountain-Pacific carriers. It summarized its reasons for this choice in its supplemental report:

> "It is difficult to ascribe the empty movement of a car to a particular commodity or class of traffic because of the variety of the lading, and the fact that cars used occasionally for hauling transcontinental traffic may at other times serve widely different uses, including local movements within each territory . . . . The defendants urge that insufficient consideration was given to special cars . . . . They would be included in [Rail Form A] tending to increase the empty-return ratios in all territories. Here they accounted for only about 4 percent of the total movement . . . .
>
> "Many special studies of empty-return movement were undertaken in these proceedings, each showing a different result. The deficiencies in the [Mountain-

> Pacific carriers'] studies of general-purpose boxcar empty return . . . are so serious in our opinion as to render them without value. We adhere to our prior finding that the 7-day studies made under an order of the Commission and based on uniform instructions to all the railroads as to how the studies were to be made, afford a more reliable basis of comparison among territories. Moreover, on the basis of the evidence in this record, the 7-day studies provide appropriate comparative ratios to the traffic in issue."

The Commission also disagreed with the Mountain-Pacific study's treatment of the "constant cost" element of road costs—that which is unrelated to volume of traffic. It found the accounting methods used to distribute these costs in Rail Form A to be more accurate. The Mountain-Pacific roads claimed that this method unduly favored the Midwestern lines by improperly ascribing the maintenance costs of branch and light-density main lines to the cost of their transcontinental traffic. The Commission, however, found that the evidence showed:

> "[T]hat the proportion of branch line mileage for each group is almost the same and the amount of traffic on branch lines is so small that some other factors cause the lower unit cost in mountain-Pacific territory. The principal factor is clearly the high density of traffic, 76 percent higher than the Midwest.
>
> "Although the cost per mile may be somewhat higher in mountainous territory, this higher cost is shared by so many more tons of traffic that the cost per ton-mile is lower.
>
> "It is the light density on the main lines in the Midwest which causes [their] higher costs. These

> lines are used by bridge traffic, and it is, therefore, quite correct to charge this bridge traffic with its proportionate share of maintaining the lines over which it moves."

The Commission made certain adjustment in the basis for determining locomotive costs; the Mountain-Pacific carriers' objections to this adjustment were directed at the Commission's reliance on differences it found between engine districts in Eastern Territory and those elsewhere. Any error in this adjustment is thus relevant only to the Eastern divisions, which are no longer in issue. The Commission also substituted Rail Form A treatment of car service costs, after finding that the Mountain-Pacific study ignored actual territorial differences in this item. Again, this issue related only to the Eastern divisions. In ascertaining the cost attributable to equipment used in the service at issue, the Commission chose a 4% rate of return on investment, a figure traditionally employed by it for this purpose, rather than the 6% figure urged by the Mountain-Pacific carriers. And, in harmony with its treatment of revenue needs, the Commission chose its standard value basis to measure the investment involved, rather than the book cost used by the Mountain-Pacific study.[30]

From the Mountain-Pacific cost study, as adjusted in these particulars, the Commission found that the Mountain-Pacific carriers enjoyed a much higher margin of revenue over costs than did the Midwestern carriers, and for this reason prescribed increases in the Midwestern divisions.

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[30] Also, when as little as 50% of the traffic on a branch line was in some way related to interterritorial service, the Mountain-Pacific study charged 100% of the expenses of the branch to the cost of the latter service. The Commission's rejection of this technique was not challenged in the District Court.

In the proceedings before the District Court, the Mountain-Pacific carriers generally attacked the adjustments made by the Commission in their cost study, claiming that their approach more accurately reflected the costs involved. They particularly maintained that the Commission should have forced the Eastern and Midwestern carriers to produce evidence on empty-car return ratios on the same basis that the Mountain-Pacific carriers had used in their cost study. The Midwestern carriers, however, had come forward with specific empty-return data, and the Commission also observed that:

> "In the prehearing conference in the instant cases the advisability of instituting an overall general investigation was discussed but the [Mountain-Pacific carriers] opposed the suggestion, and the matter was dropped. . . . Nor do we see in the record any basis for assuming that the eastern and midwestern complainants withheld vital evidence merely because they had different conceptions of the nature and extent of facts to be developed."

The Mountain-Pacific carriers also contended that certain factual premises on which the Commission based its allocation of road maintenance costs were erroneous, and that there was no foundation for the Commission's choice of a value basis for investment rather than book cost.

The District Court did not directly deal with these contentions, stating rather cryptically that in light of its conclusions on the revenue needs issues, "it is unnecessary to discuss [the cost issues]. However, no inference is to be drawn that the court is of the opinion that the [cost issues], or any other numbered issues not discussed in this opinion, are of the nature it would be required to decide should they be raised at some future time." [31]

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[31] 238 F. Supp., at 540.

The appellees argue that since the District Court failed to pass on the cost issues, we are precluded from doing so. It is true that we have occasionally stated that it is not our general practice "to review an administrative record in the first instance." *United States* v. *Great Northern R. Co.*, 343 U. S. 562, 578; *Seaboard Air Line R. Co.* v. *United States*, 382 U. S. 154, 157. But we think that policy is not applicable on the facts of this case. The presentation and discussion of evidence on cost issues constituted a dominant part of the lengthy administrative hearings, and the issues were thoroughly explored and contested before the Commission. Its factual findings and treatment of accounting problems concerned matters relating entirely to the special and complex peculiarities of the railroad industry. Our previous description of the Commission's disposition of these matters is sufficient to show that its conclusions had reasoned foundation and were within the area of its expert judgment. *B. & O. R. Co.* v. *United States*, 298 U. S. 349, 359; *New York* v. *United States*, 331 U. S. 284, 328, 335, 349. Thirteen years have elapsed since the complaints in this case were first filed. The appellees' attacks on the legal validity of the Commission's findings on cost are so insubstantial that no useful purpose would be served by further proceedings in the District Court. We conclude that there was no legal infirmity in the Commission's cost findings.

V.

The Commission devised a special divisional scale, adapted to the particular circumstances of this case and designed to produce the moderate overall increases in the Midwestern divisions that it found justified by the evidence relating to cost of service. Appellees contend that the Commission did not sufficiently explain its choice of new divisions, that the divisions are not justi-

fied by the evidence relating to cost, and that the Commission was required to find the exact revenue effect of the new divisions in precise dollar amount. None of these contentions has sufficient merit to warrant setting aside the Commission's order.

In discussing its choice of the modified 29886 divisional scale, the Commission stated:

> "Although broad groups are now employed in connection with the divisions of rates between midwestern and transcontinental territories, they are less well defined than those on which the [Eastern-Transcontinental] divisions are based, and in a number of instances they appear not to be properly related to distance. The midwestern lines urge that in lieu of prescribing new [Midwestern-Transcontinental] divisions on a group basis we should formulate scales of divisional factors and authorize the two groups of carriers to apply these to groups agreed upon by them. The defendants apparently are not opposed to that course. In our opinion divisional scales afford an appropriate means of readjusting the [Midwestern-Transcontinental] divisions, and the possibility of such use was discussed extensively in the record."

The Commission then rejected certain divisional scales urged by the Mountain-Pacific lines on the ground that they were not justified by the evidence on cost of service. However, it found that the 29886 scale, which had been discussed by a witness for the Mountain-Pacific carriers, and which the Commission had employed previously, could be adapted for use in this case after adjustments were made to reflect certain Mountain-Pacific costs:

> "Consistency with our action in prescribing intra-territorial class rates for mountain-Pacific territory

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> higher than those in the rest of the country . . . makes it logical to provide a higher scale of divisional factors for that territory here, but a difference of more than 10 percent would not be justified in our opinion. The scales shown in appendix C reflect that difference. They would produce moderate increases in some of the most important midwestern divisions."

Burlington Truck Lines v. *United States*, 371 U. S. 156, relied upon by the appellees, is thus inapposite. In that case the Court stressed that there were "no findings and no analysis" to justify the Commission's choice of remedy, "no indication of the basis on which the Commission exercised its expert discretion." 371 U. S., at 167. See also *Gilbertville Trucking Co.* v. *United States*, 371 U. S. 115, 129–131. Here the Commission explained why it had resorted to divisional scales and why it modified the familiar 29886 scale; it found that the modified scale would produce divisions appropriate to its cost findings. The Commission's "expert discretion" has a considerable role to play in so technical a matter as railroad rate divisions, and there was sufficient explanation of its exercise in this case. *Alabama G. S. R. Co.* v. *United States*, 340 U. S. 216, 227–228; *Board of Trade* v. *United States*, 314 U. S. 534, 548.

Appellees claim that if the changes in divisions were based on costs, the Commission was required to start from scratch and construct the new divisional scale directly from cost data. In their view, a scale like that used by the Commission in this case, constructed on a weighted mileage basis and adjusted to reflect comparative costs, is *per se* invalid. We cannot impose such mechanical restrictions on the range of remedies from which the Commission may choose. It is true that in a more recent territorial divisions case, involving Eastern and Southern Territories, the Commission did establish a

divisional scale constructed directly from costs.[32] But the two methods of constructing divisional scales are merely alternative mechanisms for dividing rates in conformity with the evidence.[33] What is appropriate in one case may be inappropriate in another, and the fact that the Commission may, in the light of accumulating experience, devise new remedial techniques does not make the ones that it formerly employed unlawful.[34] It is also true that the changes produced by the new scale were not the same for every existing division. Some of the particular Midwestern divisions were increased more than others, and a few were actually reduced. But that is only to be expected when a uniform scale is substituted for divisions produced by negotiation between the several carriers, and especially when, as the Commission found, the existing divisions were based on subgroupings that were not well-defined. Cf. *Beaumont, S. L. & W. R. Co.* v. *United States,* 282 U. S. 74, 86–88. The Commission's cost findings dictated moderate overall increases in the Midwestern divisions; the remedy it chose was appropriately calculated to achieve that result.

The District Court held that the Commission was required to find the exact effect, in precise dollar amount, of the new divisions on the revenues of each of the 300 carriers involved in the Commission proceedings. The appellees also contend that the Commission was obliged

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[32] *Official-Southern Divisions,* 325 I. C. C. 1, 449. The parties in that case specifically requested a cost-constructed scale.

[33] See *Beaumont, S. L. & W. R. Co.* v. *United States,* 36 F. 2d 789, 799. This Court has never suggested that there was legal infirmity in divisional scales constructed on a basis similar to that employed by the Commission in this case. *Beaumont, S. L. & W. R. Co.* v. *United States,* 282 U. S. 74; *B. & O. R. Co.* v. *United States,* 298 U. S. 349; *Boston & Maine R. Co.* v. *United States,* 371 U. S. 26, affirming 208 F. Supp. 661.

[34] *Georgia Comm'n* v. *United States,* 283 U. S. 765, 775. See also *Virginian R. Co.* v. *United States,* 272 U. S. 658, 665–666.

to make such findings, at least with respect to the various carrier groups involved. These views stem from the same misconception of the Commission's decision that we have already dealt with in the discussion concerning revenue needs. The Commission did not undertake to transfer lump sums of money from the Mountain-Pacific carriers to the Midwestern roads in order to meet certain defined revenue needs of the latter carriers. If it had, there might be more substance to these contentions. But, even in such a case, all the details of the divisions' actual operation might be difficult to foresee, and precise calculation impossible. It is also dubious whether any useful regulatory purpose would be served by such a rigid requirement, which this Court has never imposed in the past.[35] In any event, the Commission's action in this case was based not on revenue needs, but cost of service, and it found that the divisions which it established would produce moderate overall increases in the shares of the Midwestern group, in accord with its cost findings. None of the figures, charts, or tables concocted by the appellees convinces us that this determination was not based upon substantial evidence. *Alabama G. S. R. Co.* v. *United States,* 340 U. S. 216, 227–228.

Finally, the Mountain-Pacific carriers quarrel with the Commission's prescription of a minimum division of 15%. They contend that the evidence pertaining to terminal costs and standby costs that a participating railroad must incur regardless of the length of its carriage does not justify so high a minimum division. But the Commission found that: "Both in many divisional bases voluntarily established in the past and as well in our decisions it has been common practice to accord minimum divisions for carriers having relatively short hauls, sometimes as high as 20 or 25 percent but more usually 15 percent.

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[35] See nn. 26 and 27, *supra,* and accompanying text.

The increasingly burdensome terminal costs in recent years are persuasive that a 15-percent minimum is justified." We cannot find that the Commission exceeded its proper role in weighing and interpreting the evidence when it made this finding. *B. & O. R. Co.* v. *United States,* 298 U. S. 349, 359. For similar reasons, we also reject the Mountain-Pacific carriers' criticism of the weight assigned to the first 50 miles of carriage in the Commission's divisional scales.

VI.

The appellees finally contend that the Commission erred in its treatment of a single Mountain-Pacific carrier, the Denver & Rio Grande, and two Midwestern carriers, the Katy and the Frisco. It is argued that the situation of these three carriers was dissimilar to that of the groups with whom they were considered, that the typical evidence rule of the *New England Divisions Case* was inapplicable, and that the Commission was therefore required to make separate findings concerning these carriers. The appellants point out that these carriers voluntarily aligned themselves with their respective groups, presented evidence and argued the case on that basis, and never suggested that they should receive separate treatment until after the Commission's original decision. They argue that the Commission should not be required, on its own motion, to guess which of 300 carriers may require individual treatment when none of them even requests it. Cf. *United States* v. *Tucker Truck Lines,* 344 U. S. 33, 37. The District Court resolved these contentions by stating that "there has been no intentional relinquishment of a known right on the part of any of these roads." [36] This language is more appropriate to a criminal trial than an administrative proceeding.

[36] 238 F. Supp., at 539.

Reconciling the need for efficient regulatory adjudication with fairness to the parties and due concern for the public interest is a different, and difficult, problem.

But we need not undertake to resolve this problem in all its broad ramifications. The contentions made on behalf of the three individual carriers are basically quite limited. It is not argued that the Commission erred in generally treating them on a group basis and not making individual findings on their costs and revenue needs. The basic claim is that the divisions prescribed by the Commission have an unfair and unduly harsh impact on these individual carriers.

The Katy and the Frisco claim that the new divisions will result in a net decrease in their revenue shares; while many of their divisions were increased under the Commission's order, some highly profitable divisions that they had negotiated with respect to lumber carriage were reduced. The Commission found that this situation "was fully disclosed in the evidence of the midwestern lines and foreshadowed in the examiners' recommended report. The petitioners are therefore not in a position to claim that the effect of our decision was a surprise." But more than procedural grounds justify rejecting the tardy claims of the Frisco and the Katy for separate treatment. The Act does not give any carrier a vested right to divisions that it may have negotiated. It does not recognize prescriptive privileges, but requires the Commission to establish "just, reasonable, and equitable divisions." The mere fact that the new divisions may have caused a net reduction in the revenues of two Midwestern carriers while raising those of other Midwestern carriers does not establish the invalidity of the new divisions. For the high divisions on lumber previously negotiated by these two roads may have been far in excess of their cost of service. The Katy and the Frisco have not shown that the new divisions do not

fairly reflect their cost of service. The Commission was justified in stating that "[w]e see no reason for making a special exception from our findings" for them.

Moreover, the losses claimed by the Frisco and the Katy were based primarily on the new divisions' effect in apportioning revenues between themselves and the Mountain-Pacific carriers. But this aspect of the case is no longer in issue, because the Katy and the Frisco have settled with the Mountain-Pacific carriers and agreed on negotiated divisions. Thus, the Commission's divisions affect the Katy and the Frisco only insofar as they must divide revenues with other Midwestern carriers on service in which they jointly participate. The Katy and the Frisco are silent as to the effect on their revenues of the new divisions operating in this much more limited respect. We may assume that the losses produced, if any, are small.

The Denver & Rio Grande also complains of reductions in its revenues caused by the new divisions. Since it is one of the Mountain-Pacific carriers, whose existing divisions the Commission found too high in terms of cost of service, some reduction was of course to be expected. But the Denver & Rio Grande states that its competitive and geographical situation is such that it must bear a disproportionate share of the reductions in the Mountain-Pacific divisions, with allegedly disastrous effects on its net income.

The Rio Grande participates in transcontinental service between Utah gateways (Ogden and Salt Lake City) and Denver and Pueblo, Colorado, on the border of Mountain-Pacific Territory. There it interchanges with Midwestern carriers who provide service to the Missouri River and beyond. The Union Pacific operates entirely by itself a competitive route between Utah and Missouri River gateways. Both the Union Pacific and the Rio Grande accept traffic at the Utah gateways from the

Western Pacific and the Southern Pacific. The Commission's divisions break at the border of Mountain-Pacific territory, at the Colorado junctions, but do not provide for any subdivisions in Mountain-Pacific territory. The Rio Grande complains that, as a result, it must bear the whole reduction in the Mountain-Pacific divisions. Its competitor, the Union Pacific, is unaffected by the new divisions because it operates in both Mountain-Pacific and Midwestern territory and does not, insofar as relevant here, interchange with Midwestern carriers. The Rio Grande contends that the Southern Pacific and Western Pacific will not accept divisions from it lower than they obtain from the Union Pacific, and thus it will be squeezed. It alleges that it will lose $8,500,000 as a result, and that its net income is only $10,500,000.

Divisions over these competing Utah-Missouri River routes were equalized under the existing system. In the Commission proceedings, the Midwestern carriers urged that these routes also be equalized under the new divisions. However, this would require the Commission to establish subdivisions in Mountain-Pacific territory east and west of the Utah gateways, and the Mountain-Pacific carriers, including the Rio Grande, resisted this proposal on the ground that it was outside the issues raised by the pleadings. If the Rio Grande's description of its competitive situation is accurate it was obvious, from at least the time of the examiners' recommended report, that it would bear most or all of the reductions in the Mountain-Pacific divisions unless the Commission prescribed subdivisions within Mountain-Pacific territory. Nevertheless, it joined the other Mountain-Pacific lines in stating to the Commission that:

> "The Midwestern lines ask that the Commission fix divisions over Utah gateways, not served by any

> Midwestern line, in the interest of equalizing competing routes. . . . In dealing with this contention, two considerations must be sharply differentiated. The first is the general desirability of equalizing divisions; the Mountain-Pacific lines agree that the parties should be free to equalize divisions over competitive routes . . . . But a very different question is raised when the Midwestern lines ask the Commission to prescribe divisions over gateways 500 miles inside Mountain-Pacific territory and served only by Mountain-Pacific lines. Such a prescription is beyond the issues of the complaints before the Commission in this proceeding."

In rejecting the belated claims made by the Mountain-Pacific carriers on behalf of the Rio Grande, the Commission was justified in concluding that: "The midwestern complainants are correct in stating that the 'problem is left precisely where the transcontinental defendants insisted that it be left.' We therefore see no reason for the modification of our findings sought by the defendants."

Of course, the Commission could not simply rest on such notions of estoppel to justify infliction of substantial injury upon an important railroad serving the public. But it was not at all clear at the time of the Commission's decision, and it is still not clear, that the new divisions will have the disastrous or unfair effects alleged by the Rio Grande. The revenue effect on the Rio Grande hinges, in important part, on the subdivisions it is able to negotiate with the other Mountain-Pacific carriers. The Mountain-Pacific carriers, including the Rio Grande, urged the Commission to permit such voluntary negotiation in the first instance before taking action itself.[37] The Commission acceded to this request by spe-

[37] After the examiners' recommended report, the Mountain-Pacific carriers told the Commission that: "Any legitimate concern the

cifically providing in its orders that the carriers involved were free to negotiate divisions to equalize competitive routes between gateways. Thus at the time of the Commission's decisions, the impact of the new divisions on the Rio Grande's revenues was speculative and uncertain, and voluntary negotiation of subdivisions was available. It could be assumed that the actual reduction in the Rio Grande's revenues might turn out to be no greater than that of the other Mountain-Pacific carriers. In these circumstances, the Commission was not required to rearrange the foundations of a decision that had been reached after long years of proceedings and affected 300 carriers, nor was it required to embark on new hearings to deal with the Rio Grande's claims.

It now appears that the impact of the new divisions may in fact be much less severe than the Rio Grande feared. The Midwestern appellants have cited evidence tending to show that the reduction in its revenue is more like $850,000 than $8,500,000. We, of course, do not resolve this issue. But we do think that the Commission was justified in refusing plenary consideration of the Rio Grande's claims in 1963. If the Commission's new divisions, in connection with the subdivisions that the Rio Grande is able to negotiate with its fellow Mountain-Pacific carriers, do have an impact on the Rio Grande that is unfairly disproportionate or so severe that the Rio Grande's ability to provide service is jeopardized, the Rio Grande may apply to the Commission for relief. There is no reason to suppose that relief will

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Midwestern lines may have in any threat to the equalization of divisions over Utah gateways is premature. If any problems arise as to equalization of divisions over those gateways on a fair and equitable basis, they can be considered in the negotiations contemplated in the Recommended Report."

not be promptly forthcoming if the Rio Grande's claim is meritorious.[38]

We conclude as did the Court in the *New England Divisions Case:*

> "To consider the weight of the evidence, or the wisdom of the order entered, is beyond our province. . . . But the way is still open to any carrier to apply to the Commission for modification of the order, if it is believed to operate unjustly in any respect." 261 U. S., at 204.

VII.

We hold that the Commission's original and supplemental orders are valid, and that the District Court erred in setting them aside. When it entered interlocutory injunctions against these orders, the District Court imposed certain protective conditions. They provided that if the Commission's orders were eventually upheld, they would be deemed effective as of July 1, 1963, and March 30, 1964, respectively, and the various carriers would be required to resettle the interim revenues they received in accordance with the divisions established in the orders. Pending appeal of its final decision to this

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[38] In *Official-Southern Divisions,* 325 I. C. C. 449, 450, the Commission stated:

"To avoid serious injustice to any carrier, our procedures permit any railroad to be excepted from a group order, in whole or in part, on a proper showing of differing circumstances. Where it is demonstrated by competent and reliable evidence that a carrier's financial or revenue needs situation requires the preservation of its share of the joint rates on the same level as presently existing or at a level different than that to be maintained for the group as a whole, we may provide special individual treatment in order to maintain such carrier as part of the Nation's transportation system without regard to its costs of rendering the service."

Court, the District Court stayed execution of its judgment permanently setting aside the Commission's order and remanding the case to the Commission; with the consent of the parties, it also provided that these protective conditions should be continued in effect. The Commission has required the carriers involved to adopt certain accounting procedures designed to facilitate the eventual implementation of these protective conditions. Since we now uphold the validity of the Commission's orders, it will be necessary for the District Court, with such assistance from the Commission as seems appropriate, to supervise resettlement of revenues in accordance with its protective conditions. The judgment of the District Court is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus.

REITMAN ET AL. *v.* MULKEY ET AL.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 483. Argued March 20–21, 1967.—Decided May 29, 1967.

The California Legislature, during the period 1959–1963, enacted several statutes regulating racial discrimination in housing. In 1964, pursuant to an initiative and referendum, Art. I, § 26, was added to the state constitution. It provided in part that neither the State nor any agency thereof "shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses." The California Supreme Court held that Art. I, § 26, was designed to overturn state laws that bore on the right of private persons to discriminate, that it invalidly involved the State in racial discrimination in the housing market and that it changed the situation from one in which discriminatory practices were restricted to one where they are "encouraged," within the meaning of this Court's decisions. The court concluded that Art. I, § 26, unconstitutionally involves the State in racial discrimination and is therefore invalid under the Equal Protection Clause of the Fourteenth Amendment. *Held:* The California Supreme Court believes that Art. I, § 26, which does not merely repeal existing law forbidding private racial discrimination but authorizes racial discrimination in the housing market and establishes the right to discriminate as a basic state policy, will significantly encourage and involve the State in private discriminations. No persuasive considerations indicating that the judgments herein should be overturned have been presented, and they are affirmed. Pp. 373–381.

64 Cal. 2d 529, 877, 413 P. 2d 825, 847, affirmed.

Samuel O. Pruitt, Jr., argued the cause for petitioners. With him on the briefs was *William French Smith.*

Herman F. Selvin and *A. L. Wirin* argued the cause for respondents. With them on the brief were *Fred Okrand, Joseph A. Ball* and *Nathaniel S. Colley.*

Solicitor General Marshall, by special leave of Court, argued the cause for the United States, as *amicus curiae*, urging affirmance. With him on the brief were *Assistant Attorney General Doar, Ralph S. Spritzer, Louis F. Claiborne, Nathan Lewin* and *Alan G. Marer*.

Briefs of *amici curiae*, urging affirmance, were filed by *Thomas C. Lynch*, Attorney General, *Charles A. O'Brien*, Chief Deputy Attorney General, *Miles T. Rubin*, Senior Assistant Attorney General, and *Loren Miller, Jr., Howard J. Bechefsky, Philip M. Rosten* and *Harold J. Smotkin*, Deputy Attorneys General, for the State of California; by *Louis J. Lefkowitz, pro se, Samuel A. Hirshowitz*, First Assistant Attorney General, and *George D. Zuckerman* and *Lawrence J. Gross*, Assistant Attorneys General, for the Attorney General of the State of New York; by *Gerald D. Marcus* for the California Democratic State Central Committee; by *Marshall W. Krause* for the American Civil Liberties Union of Northern California; by *Joseph B. Robison* and *Sol Rabkin* for the National Committee against Discrimination in Housing; and by *Abe F. Levy* for the United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) AFL–CIO, Region 6, et al.

MR. JUSTICE WHITE delivered the opinion of the Court.

The question here is whether Art. I, § 26, of the California Constitution denies "to any person . . . the equal protection of the laws" within the meaning of the Fourteenth Amendment of the Constitution of the United States.[1] Section 26 of Art. I, an initiated measure sub-

[1] Section 1 of the Fourteenth Amendment provides as follows:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

mitted to the people as Proposition 14 in a statewide ballot in 1964, provides in part as follows:

> "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses."

The real property covered by § 26 is limited to residential property and contains an exception for state-owned real estate.[2]

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[2] The following is the full text of § 26: "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

"'Person' includes individuals, partnerships, corporations and other legal entities and their agents or representatives but does not include the State or any subdivision thereof with respect to the sale, lease or rental of property owned by it.

"'Real property' consists of any interest in real property of any kind or quality, present or future, irrespective of how obtained or financed, which is used, designed, constructed, zoned or otherwise devoted to or limited for residential purposes whether as a single family dwelling or as a dwelling for two or more persons or families living together or independently of each other.

"This Article shall not apply to the obtaining of property by eminent domain pursuant to Article I, Sections 14 and 14½ of this Constitution, nor to the renting or providing of any accommodations for lodging purposes by a hotel, motel or other similar public place engaged in furnishing lodging to transient guests.

"If any part or provision of this Article, or the application thereof to any person or circumstance, is held invalid, the remainder of the Article, including the application of such part or provision to other persons or circumstances, shall not be affected thereby and shall continue in full force and effect. To this end the provisions of this Article are severable." (Cal. Const., Art. I, § 26.)

The issue arose in two separate actions in the California courts, *Mulkey* v. *Reitman* and *Prendergast* v. *Snyder*. In *Reitman*, the Mulkeys, who are husband and wife and respondents here, sued under § 51 and § 52 of the California Civil Code [3] alleging that petitioners had refused to rent them an apartment solely on account of their race. An injunction and damages were demanded. Petitioners moved for summary judgment on the ground that §§ 51 and 52, insofar as they were the basis for the Mulkeys' action, had been rendered null and void by the adoption of Proposition 14 after the filing of the complaint. The trial court granted the motion and respondents took the case to the California Supreme Court.

In the *Prendergast* case, respondents, husband and wife, filed suit in December 1964 seeking to enjoin eviction from their apartment; respondents alleged that the eviction was motivated by racial prejudice and therefore would violate § 51 and § 52 of the Civil Code. Petitioner Snyder cross-complained for a judicial declaration that he was entitled to terminate the month-to-month tenancy even if his action was based on racial considerations. In denying petitioner's motion for summary

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[3] Cal. Civ. Code §§ 51 and 52 provide in part as follows:

"All persons within the jurisdiction of this State are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

. . . . . .

"Whoever denies, or who aids, or incites such denial, or whoever makes any discrimination, distinction or restriction on account of color, race, religion, ancestry, or national origin, contrary to the provisions of Section 51 of this code, is liable for each and every such offense for the actual damages, and two hundred fifty dollars ($250) in addition thereto, suffered by any person denied the rights provided in Section 51 of this code."

judgment, the trial court found it unnecessary to consider the validity of Proposition 14 because it concluded that judicial enforcement of an eviction based on racial grounds would in any event violate the Equal Protection Clause of the United States Constitution.[4] The cross-complaint was dismissed with prejudice [5] and petitioner Snyder appealed to the California Supreme Court which considered the case along with *Mulkey* v. *Reitman*. That court, in reversing the *Reitman* case, held that Art. I, § 26, was invalid as denying the equal protection of the laws guaranteed by the Fourteenth Amendment. 64 Cal. 2d 529, 413 P. 2d 825. For similar reasons, the court affirmed the judgment in the *Prendergast* case. 64 Cal. 2d 877, 413 P. 2d 847. We granted certiorari because the cases involve an important issue arising under the Fourteenth Amendment. 385 U. S. 967.

We affirm the judgments of the California Supreme Court. We first turn to the opinion of that court in *Reitman*, which quite properly undertook to examine the constitutionality of § 26 in terms of its "immediate objective," its "ultimate effect" and its "historical context and the conditions existing prior to its enactment." Judgments such as these we have frequently undertaken ourselves. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *McCabe* v. *Atchison, Topeka & Santa Fe R. Co.*, 235 U. S. 151; *Lombard* v. *Louisiana*, 373 U. S. 267; *Robinson* v. *Florida*, 378 U. S. 153; *Turner* v. *City of Memphis*, 369 U. S. 350; *Anderson* v. *Martin*, 375 U. S. 399. But here the California Supreme Court has addressed itself to these mat-

[4] The trial court considered the case to be controlled by *Abstract Investment Co.* v. *Hutchinson*, 204 Cal. App. 2d 242, 22 Cal. Rptr. 309, which in turn placed major reliance on *Shelley* v. *Kraemer*, 334 U. S. 1, and *Barrows* v. *Jackson*, 346 U. S. 249.

[5] Respondents' complaint was dismissed without prejudice based on the trial court's finding that petitioner would not seek eviction without the declaratory relief he had requested.

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ters and we should give careful consideration to its views because they concern the purpose, scope, and operative effect of a provision of the California Constitution.

First, the court considered whether § 26 was concerned at all with private discriminations in residential housing. This involved a review of past efforts by the California Legislature to regulate such discriminations. The Unruh Act, Civ. Code §§ 51–52, on which respondents based their cases, was passed in 1959.[6] The Hawkins Act, formerly Health & Safety Code §§ 35700–35741, followed and prohibited discriminations in publicly assisted housing. In 1961, the legislature enacted proscriptions against restrictive covenants. Finally, in 1963, came the Rumford Fair Housing Act, Health & Safety Code §§ 35700–35744, superseding the Hawkins Act and prohibiting racial discriminations in the sale or rental of any private dwelling containing more than four units. That act was enforceable by the State Fair Employment Practice Commission.

It was against this background that Proposition 14 was enacted. Its immediate design and intent, the California court said, were "to overturn state laws that bore on the right of private sellers and lessors to discriminate," the Unruh and Rumford Acts, and "to forestall future state action that might circumscribe this right." This aim was successfully achieved: the adoption of Proposition 14 "generally nullifies both the Rumford and Unruh Acts as they apply to the housing market," and establishes "a purported constitutional right to *privately* discriminate on grounds which admittedly would be unavailable under the Fourteenth Amendment *should state action* be involved."

Second, the court conceded that the State was permitted a neutral position with respect to private racial

[6] See n. 3, *supra*.

discriminations and that the State was not bound by the Federal Constitution to forbid them. But, because a significant state involvement in private discriminations could amount to unconstitutional state action, *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, the court deemed it necessary to determine whether Proposition 14 invalidly involved the State in racial discriminations in the housing market. Its conclusion was that it did.

To reach this result, the state court examined certain prior decisions in this Court in which discriminatory state action was identified. Based on these cases, *Robinson* v. *Florida*, 378 U. S. 153, 156; *Anderson* v. *Martin*, 375 U. S. 399; *Barrows* v. *Jackson*, 346 U. S. 249, 254; *McCabe* v. *Atchison, Topeka & Santa Fe R. Co.*, 235 U. S. 151, it concluded that a prohibited state involvement could be found "even where the state can be charged with only encouraging," rather than commanding discrimination. Also of particular interest to the court was MR. JUSTICE STEWART'S concurrence in *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 726, where it was said that the Delaware courts had construed an existing Delaware statute as "authorizing" racial discrimination in restaurants and that the statute was therefore invalid. To the California court "[t]he instant case presents an undeniably analogous situation" wherein the State had taken affirmative action designed to make private discriminations legally possible. Section 26 was said to have changed the situation from one in which discrimination was restricted "to one wherein it is encouraged, within the meaning of the cited decisions"; § 26 was legislative action "which authorized private discrimination" and made the State "at least a partner in the instant act of discrimination . . . ." The court could "conceive of no other purpose for an application of section 26 aside from authorizing the perpetration of a purported private discrimination . . . ." The judgment

of the California court was that § 26 unconstitutionally involves the State in racial discriminations and is therefore invalid under the Fourteenth Amendment.

There is no sound reason for rejecting this judgment. Petitioners contend that the California court has misconstrued the Fourteenth Amendment since the repeal of any statute prohibiting racial discrimination, which is constitutionally permissible, may be said to "authorize" and "encourage" discrimination because it makes legally permissible that which was formerly proscribed. But, as we understand the California court, it did not posit a constitutional violation on the mere repeal of the Unruh and Rumford Acts. It did not read either our cases or the Fourteenth Amendment as establishing an automatic constitutional barrier to the repeal of an existing law prohibiting racial discriminations in housing; nor did the court rule that a State may never put in statutory form an existing policy of neutrality with respect to private discriminations. What the court below did was first to reject the notion that the State was required to have a statute prohibiting racial discriminations in housing. Second, it held the intent of § 26 was to authorize private racial discriminations in the housing market, to repeal the Unruh and Rumford Acts and to create a constitutional right to discriminate on racial grounds in the sale and leasing of real property. Hence, the court dealt with § 26 as though it expressly authorized and constitutionalized the private right to discriminate. Third, the court assessed the ultimate impact of § 26 in the California environment and concluded that the section would encourage and significantly involve the State in private racial discrimination contrary to the Fourteenth Amendment.

The California court could very reasonably conclude that § 26 would and did have wider impact than a mere repeal of existing statutes. Section 26 mentioned neither

the Unruh nor Rumford Act in so many words. Instead, it announced the constitutional right of any person to decline to sell or lease his real property to anyone to whom he did not desire to sell or lease. Unruh and Rumford were thereby *pro tanto* repealed. But the section struck more deeply and more widely. Private discriminations in housing were now not only free from Rumford and Unruh but they also enjoyed a far different status than was true before the passage of those statutes. The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources. All individuals, partnerships, corporations and other legal entities, as well as their agents and representatives, could now discriminate with respect to their residential real property, which is defined as any interest in real property of any kind or quality, "irrespective of how obtained or financed," and seemingly irrespective of the relationship of the State to such interests in real property. Only the State is excluded with respect to property owned by it.[7]

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[7] In addition to the case we now have before us, two other cases decided the same day by the California Supreme Court are instructive concerning the range and impact of Art. I, § 26, of the California Constitution. In *Hill* v. *Miller*, 413 P. 2d 852, on rehearing, 64 Cal. 2d 757, 415 P. 2d 33, a Negro tenant sued to restrain an eviction from a leased, single-family dwelling. The notice to quit served by the owner had expressly recited: "The sole reason for this notice is that I have elected to exercise the right conferred upon me by Article I Section 26, California Constitution, to rent said premises to members of the Caucasian race." Although the California court had invalidated § 26, the court ruled against the Negro

This Court has never attempted the "impossible task" of formulating an infallible test for determining whether the State "in any of its manifestations" has become significantly involved in private discriminations. "Only by sifting facts and weighing circumstances" on a case-by-case basis can a "nonobvious involvement of the State in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722. Here the California court, armed as it was with the knowledge of the facts and circumstances concerning the passage and potential impact of § 26, and familiar with the milieu in which that provision would operate, has determined that the provision would involve the State in

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plaintiff because the Unruh Act did not cover single-family dwellings. Thus the landlord's reliance on § 26 was superfluous.

In *Peyton* v. *Barrington Plaza Corp.*, 64 Cal. 2d 880, 413 P. 2d 849, a Negro physician sued to require the defendant corporation to lease him an apartment in Barrington Plaza which was described in the opinion as follows:

"that defendant received a $17,000,000, low interest rate loan under the National Housing Act to construct Barrington Plaza; that such sum represents 90 percent of the construction costs of the plaza; that the development is a part of the urban redevelopment program undertaken by the City of Los Angeles; that Barrington Plaza is the largest apartment development in the western United States, providing apartment living for 2,500 people; that it includes many retail shops and professional services within its self-contained facilities; that it provides a fall-out shelter, completely stocked by the federal government with emergency supplies; that the plaza replaced private homes of both Caucasians and non-Caucasians; that the city effected zoning changes to accommodate the development; that the defendant's securities were sold, its construction contracts were let, its building permits were issued and its shops and professional services established all pursuant to state or local approval, cooperation and authority."

The defendant defended the action and moved for judgment on the pleadings based on Art. I, § 26, of the California Constitution. The motion was granted but the judgment was reversed based on the decision in *Mulkey* v. *Reitman*.

private racial discriminations to an unconstitutional degree. We accept this holding of the California court.

The assessment of § 26 by the California court is similar to what this Court has done in appraising state statutes or other official actions in other contexts. In *McCabe* v. *Atchison, Topeka & Santa Fe R. Co.*, 235 U. S. 151, the Court dealt with a statute which, as construed by the Court, authorized carriers to provide cars for white persons but not for Negroes. Though dismissal of the complaint on a procedural ground was affirmed, the Court made it clear that such a statute was invalid under the Fourteenth Amendment because a carrier refusing equal service to Negroes would be "acting in the matter under the authority of a state law." This was nothing less than considering a permissive state statute as an authorization to discriminate and as sufficient state action to violate the Fourteenth Amendment in the context of that case. Similarly, in *Nixon* v. *Condon*, 286 U. S. 73,[8] the Court was faced with a statute empowering the executive committee of a political party to prescribe the qualifications of its members for voting or for other participation, but containing no directions with respect to the exercise of that power. This was authority which the committee otherwise might not have had and which was used by the committee to bar Negroes from voting in primary elections. Reposing this power in the executive committee was said to insinuate the State into the self-regulatory, decision-making scheme of the voluntary association; the exercise of the power was viewed as an expression of state authority contrary to the Fourteenth Amendment.

In *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, the operator-lessee of a restaurant located in a

[8] This case was a sequel to *Nixon* v. *Herndon*, 273 U. S. 536, which outlawed statutory disqualification of Negroes from voting in primary elections.

building owned by the State and otherwise operated for public purposes, refused service to Negroes. Although the State neither commanded nor expressly authorized or encouraged the discriminations, the State had "elected to place its power, property and prestige behind the admitted discrimination" and by "its inaction . . . has . . . made itself a party to the refusal of service . . ." which therefore could not be considered the purely private choice of the restaurant operator.

In *Peterson* v. *City of Greenville*, 373 U. S. 244, and in *Robinson* v. *Florida*, 378 U. S. 153, the Court dealt with state statutes or regulations requiring, at least in some respects, segregation in facilities and services in restaurants. These official provisions, although obviously unconstitutional and unenforceable, were deemed in themselves sufficient to disentitle the State to punish, as trespassers, Negroes who had been refused service in the restaurants. In neither case was any proof required that the restaurant owner had actually been influenced by the state statute or regulation. Finally, in *Lombard* v. *Louisiana*, 373 U. S. 267, the Court interpreted public statements by New Orleans city officials as announcing that the city would not permit Negroes to seek desegregated service in restaurants. Because the statements were deemed to have as much coercive potential as the ordinance in the *Peterson* case, the Court treated the city as though it had actually adopted an ordinance forbidding desegregated service in public restaurants.

None of these cases squarely controls the case we now have before us. But they do illustrate the range of situations in which discriminatory state action has been identified. They do exemplify the necessity for a court to assess the potential impact of official action in determining whether the State has significantly involved itself with invidious discriminations. Here we are dealing with a provision which does not just repeal an existing law

forbidding private racial discriminations. Section 26 was intended to authorize, and does authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the State. The California Supreme Court believes that the section will significantly encourage and involve the State in private discriminations. We have been presented with no persuasive considerations indicating that these judgments should be overturned.

Affirmed.

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, I add a word to indicate the dimensions of our problem.

This is not a case as simple as the one where a man with a bicycle or a car or a stock certificate or even a log cabin asserts the right to sell it to whomsoever he pleases, excluding all others whether they be Negro, Chinese, Japanese, Russians, Catholics, Baptists, or those with blue eyes. We deal here with a problem in the realm of zoning, similar to the one we had in *Shelley* v. *Kraemer*, 334 U. S. 1, where we struck down restrictive covenants.

Those covenants are one device whereby a neighborhood is kept "white" or "Caucasian" as the dominant interests desire. Proposition 14 in the setting of our modern housing problem is only another device of the same character.

Real estate brokers and mortgage lenders are largely dedicated to the maintenance of segregated communities.[1] Realtors commonly believe it is unethical to sell or rent to a Negro in a predominantly white or all-white neighborhood,[2] and mortgage lenders throw their weight along-

[1] Civil Rights U. S. A., Housing in Washington, D. C., U. S. Commission on Civil Rights 12–15 (1962).

[2] *Id.*, 12–13.

side segregated communities, rejecting applications by members of a minority group who try to break the white phalanx save and unless the neighborhood is in process of conversion into a mixed or a Negro community.[3] We are told by the Commission on Civil Rights:

> "Property owners' prejudices are reflected, magnified, and sometimes even induced by real estate brokers, through whom most housing changes hands. Organized brokers have, with few exceptions, followed the principle that only a 'homogeneous' neighborhood assures economic soundness. Their views in some cases are so vigorously expressed as to discourage property owners who would otherwise be concerned only with the color of a purchaser's money, and not with that of his skin. . . .[4]
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> . . . . . .
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> "The financial community, upon which mortgage financing—and hence the bulk of home purchasing and home building—depends, also acts to a large extent on the premise that only a homogeneous neighborhood can offer an economically sound investment. For this reason, plus the fear of offending their other clients, many mortgage-lending institutions refuse to provide home financing for houses in a 'mixed' neighborhood. The persistent stereotypes of certain minority groups as poor credit

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[3] *Id.*, 14–15.

[4] As the Hannah Commission said:

"Area housing patterns are sharply defined along racial lines. Most members of the housing industry appear to respect them. Although it is unlikely that these patterns are determined by formal agreement, it is probable that they are maintained by tacit understandings." *Id.*, 15.

risks also block the flow of credit, although these stereotypes have often been proved unjustified." Housing, U. S. Commission on Civil Rights 2–3 (1961).

The builders join in the same scheme: [5]

". . . private builders often adopt what they believe are the views of those to whom they expect to sell and of the banks upon whose credit their own operations depend. In short, as the Commission on Race and Housing has concluded, 'it is the real estate brokers, builders, and mortgage finance institutions, which translate prejudice into discriminatory action.' Thus, at every level of the private housing market members of minority groups meet mutually reinforcing and often unbreakable barriers of rejection."

Proposition 14 is a form of sophisticated discrimination [6] whereby the people of California harness the energies of private groups to do indirectly what they cannot under our decisions [7] allow their government to do.

George A. McCanse, chairman of the legislative committee of the Texas Real Estate Association, while giving his views on Title IV of the proposed Civil Rights Act of 1966 (H. R. 14765), which would prohibit discrimination in housing by property owners, real estate brokers, and others engaged in the sale, rental or financing of housing, stated that he warned groups to which he spoke of "the grave dangers inherent in any type

[5] Housing, U. S. Commission on Civil Rights 3 (1961).

[6] Freedom to the Free, Century of Emancipation, Report to the President, U. S. Commission on Civil Rights 96 (1963).

[7] *City of Richmond* v. *Deans*, 281 U. S. 704.

of legislation that would erode away the rights that go with the ownership of property." [8] He pointed out that

> "[E]ach time we citizens of this country lose any of the rights that go with the ownership of property, we are moving that much closer to a centralized government in which ultimately the right to own property would be denied." [9]

That apparently is a common view. It overlooks several things. First, the right to own or lease property is already denied to many solely because of the pigment of their skin; they are, indeed, under the control of a few who determine where and how the colored people shall live and what the nature of our cities will be. Second, the agencies that are zoning the cities along racial lines are state licensees.

Zoning is a state and municipal function. See *Euclid* v. *Ambler Co.*, 272 U. S. 365, 389 *et seq.*; *Berman* v. *Parker*, 348 U. S. 26, 34–35. When the State leaves that function to private agencies or institutions which are licensees and which practice racial discrimination and zone our cities into white and black belts or white and black ghettoes, it suffers a governmental function to be performed under private auspices in a way the State itself may not act. The present case is therefore kin to *Terry* v. *Adams*, 345 U. S. 461, 466, where a State allowed a private group (known as the Jaybird Association, which was the dominant political group in county elections) to perform an electoral function in derogation of the rights of Negroes under the Fifteenth Amendment.

Leaving the zoning function to groups which practice racial discrimination and are licensed by the States

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[8] Hearings before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 2d Sess., ser. 16, 1639 (1966).

[9] *Ibid.*

constitutes state action in the narrowest sense in which *Shelley* v. *Kraemer, supra,* can be construed. For as noted by MR. JUSTICE BLACK in *Bell* v. *Maryland,* 378 U. S. 226, 329 (dissenting), restrictive covenants "constituted a restraint on alienation of property, sometimes in perpetuity, which, if valid, was in reality the equivalent of and had the effect of state and municipal zoning laws, accomplishing the same kind of racial discrimination as if the State had passed a statute instead of leaving this objective to be accomplished by a system of private contracts, enforced by the State."

Under California law no person may "engage in the business, act in the capacity of, advertise or assume to act as a real estate broker or a real estate salesman within this State without first obtaining a real estate license." Calif. Bus. & Prof. Code § 10130. These licensees are designated to serve the public. Their licenses are not restricted, and could not be restricted, to effectuate a policy of segregation. That would be state action that is barred by the Fourteenth Amendment. There is no difference, as I see it, between a State authorizing a licensee to practice racial discrimination and a State, without any express authorization of that kind nevertheless launching and countenancing the operation of a licensing system in an environment where the whole weight of the system is on the side of discrimination. In the latter situation the State is impliedly sanctioning what it may not do specifically.

If we were in a domain exclusively private, we would have different problems. But urban housing is in the public domain as evidenced not only by the zoning problems presented but by the vast schemes of public financing with which the States and the Nation have been extensively involved in recent years. Urban housing is clearly marked with the public interest. Urban housing,

like restaurants, inns, and carriers (*Bell* v. *Maryland*, 378 U. S. 226, 253–255, separate opinion), or like telephone companies, drugstores, or hospitals, is affected with a public interest in the historic and classical sense. See *Lombard* v. *Louisiana*, 373 U. S. 267, 275–278 (concurring opinion).

I repeat what was stated by Holt, C. J., in *Lane* v. *Cotton*, 12 Mod. 472, 484 (1701):

> "[W]herever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is *eo ipso* bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him . . . . If on the road a shoe fall off my horse, and I come to a smith to have one put on, and the smith refuse to do it, an action will lie against him, because he has made profession of a trade which is for the public good, and has thereby exposed and vested an interest of himself in all the King's subjects that will employ him in the way of his trade. If an innkeeper refuse to entertain a guest where his house is not full, an action will lie against him, and so against a carrier, if his horses be not loaded, and he refuse to take a packet proper to be sent by a carrier."

Since the real estate brokerage business is one that can be and is state-regulated and since it is state-licensed, it must be dedicated, like the telephone companies and the carriers and the hotels and motels, to the requirements of service to all without discrimination—a standard that in its modern setting is conditioned by the demands of the Equal Protection Clause of the Fourteenth Amendment.

And to those who say that Proposition 14 represents the will of the people of California, one can only reply:

> "Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents. This is a truth of great importance, but not yet sufficiently attended to . . . ." 5 Writings of James Madison 272 (Hunt ed. 1904).

MR. JUSTICE HARLAN, whom MR. JUSTICE BLACK, MR. JUSTICE CLARK, and MR. JUSTICE STEWART join, dissenting.

I consider that this decision, which cuts deeply into state political processes, is supported neither by anything "found" by the Supreme Court of California nor by any of our past cases decided under the Fourteenth Amendment. In my view today's holding, salutary as its result may appear at first blush, may in the long run actually serve to handicap progress in the extremely difficult field of racial concerns. I must respectfully dissent.

The facts of this case are simple and undisputed. The legislature of the State of California has in the last decade enacted a number of statutes restricting the right of private landowners to discriminate on the basis of such factors as race in the sale or rental of property. These laws aroused considerable opposition, causing certain groups to organize themselves and to take advantage of procedures embodied in the California Constitution permitting a "proposition" to be presented to the voters for a constitutional amendment. "Proposition 14" was

thus put before the electorate in the 1964 election and was adopted by a vote of 4,526,460 to 2,395,747. The Amendment, Art. I, § 26, of the State Constitution, reads in relevant part as follows:

> "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses." [1]

I am wholly at a loss to understand how this straightforward effectuation of a change in the California Constitution can be deemed a violation of the Fourteenth Amendment, thus rendering § 26 void and petitioners' refusal to rent their properties to respondents, because of their race, illegal under prior state law. The Equal Protection Clause of the Fourteenth Amendment, which forbids a State to use its authority to foster discrimination based on such factors as race, *Takahashi* v. *Fish & Game Comm'n*, 334 U. S. 410; *Brown* v. *Board of Education*, 347 U. S. 483; *Goss* v. *Board of Education*, 373 U. S. 683, does not undertake to control purely personal prejudices and predilections, and individuals acting on their own are left free to discriminate on racial grounds if they are so minded, *Civil Rights Cases*, 109 U. S. 3. By the same token, the Fourteenth Amendment does not require of States the passage of laws preventing such private discrimination, although it does not of course disable them from enacting such legislation if they wish.

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[1] "Real Property" is defined by § 26 as "any interest in real property of any kind or quality, present or future, irrespective of how obtained or financed, which is used, designed, constructed, zoned or otherwise devoted to or limited for residential purposes whether as a single family dwelling or as a dwelling for two or more persons or families living together or independently of each other."

In the case at hand California, acting through the initiative and referendum, has decided to remain "neutral" in the realm of private discrimination affecting the sale or rental of private residential property; in such transactions private owners are now free to act in a discriminatory manner previously forbidden to them. In short, all that has happened is that California has effected a *pro tanto* repeal of its prior statutes forbidding private discrimination. This runs no more afoul of the Fourteenth Amendment than would have California's failure to pass any such antidiscrimination statutes in the first instance. The fact that such repeal was also accompanied by a constitutional prohibition against future enactment of such laws by the California Legislature cannot well be thought to affect, from a federal constitutional standpoint, the validity of what California has done. The Fourteenth Amendment does not reach such state constitutional action any more than it does a simple legislative repeal of legislation forbidding private discrimination.

I do not think the Court's opinion really denies any of these fundamental constitutional propositions. Rather it attempts to escape them by resorting to arguments which appear to me to be entirely ill-founded.

I.

The Court attempts to fit § 26 within the coverage of the Equal Protection Clause by characterizing it as in effect an affirmative call to residents of California to discriminate. The main difficulty with this viewpoint is that it depends upon a characterization of § 26 that cannot fairly be made. The provision is neutral on its face, and it is only by in effect asserting that this requirement of passive official neutrality is camouflage that the Court is able to reach its conclusion. In depicting the

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provision as tantamount to active state encouragement of discrimination the Court essentially relies on the fact that the California Supreme Court so concluded. It is said that the findings of the highest court of California as to the meaning and impact of the enactment are entitled to great weight. I agree of course, that *findings of fact* by a state court should be given great weight, but this familiar proposition hardly aids the Court's holding in this case.

There is no disagreement whatever but that § 26 was meant to nullify California's fair-housing legislation and thus to remove from private residential property transactions the state-created impediment upon freedom of choice. There were no disputed issues of fact at all, and indeed the California Supreme Court noted at the outset of its opinion that "[i]n the trial court proceedings allegations of the complaint were not factually challenged, no evidence was introduced, and the only matter placed in issue was the legal sufficiency of the allegations." 64 Cal. 2d 529, 531–532, 413 P. 2d 825, 827. There was no finding, for example, that the defendants' actions were anything but the product of their own private choice. Indeed, since the alleged racial discrimination that forms the basis for the *Reitman* refusal to rent on racial grounds occurred in 1963, it is not possible to contend that § 26 in any way influenced this particular act. There were no findings as to the general effect of § 26. The Court declares that the California court "held the intent of § 26 was to authorize private racial discriminations in the housing market . . . ," *ante*, p. 376, but there is no supporting fact in the record for this characterization. Moreover, the grounds which prompt legislators or state voters to repeal a law do not determine its constitutional validity. That question is decided by what the law does, not by what those who

voted for it wanted it to do, and it must not be forgotten that the Fourteenth Amendment does not compel a State to put or keep any particular law about race on its books. The Amendment only forbids a State to pass or keep in effect laws discriminating on account of race. California has not done this.

A state enactment, particularly one that is simply permissive of private decision-making rather than coercive and one that has been adopted in this most democratic of processes, should not be struck down by the judiciary under the Equal Protection Clause without persuasive evidence of an invidious purpose or effect. The only "factual" matter relied on by the majority of the California Supreme Court was the context in which Proposition 14 was adopted, namely, that several strong antidiscrimination acts had been passed by the legislature and opposed by many of those who successfully led the movement for adoption of Proposition 14 by popular referendum. These circumstances, and these alone, the California court held, made § 26 unlawful under this Court's cases interpreting the Equal Protection Clause. This, of course, is nothing but a legal conclusion as to federal constitutional law, the California Supreme Court not having relied in any way upon the State Constitution. Accepting all the suppositions under which the state court acted, I cannot see that its conclusion is entitled to any special weight in the discharge of our own responsibilities. Put in another way, I cannot transform the California court's conclusion of law into a finding of fact that the State through the adoption of § 26 is actively promoting racial discrimination. It seems to me manifest that the state court decision rested entirely on what that court conceived to be the compulsion of the Fourteenth Amendment, not on any fact-finding by the state courts.

II.

There is no question that the adoption of § 26, repealing the former state antidiscrimination laws and prohibiting the enactment of such state laws in the future, constituted "state action" within the meaning of the Fourteenth Amendment. The only issue is whether this provision impermissibly deprives any person of equal protection of the laws. As a starting point, it is clear that any statute requiring unjustified discriminatory treatment is unconstitutional. *E. g., Nixon* v. *Herndon,* 273 U. S. 536; *Brown* v. *Board of Education, supra; Peterson* v. *City of Greenville,* 373 U. S. 244. And it is no less clear that the Equal Protection Clause bars as well discriminatory governmental administration of a statute fair on its face. *E. g., Yick Wo* v. *Hopkins,* 118 U. S. 356. This case fits within neither of these two categories: Section 26 is by its terms inoffensive, and its provisions require no affirmative governmental enforcement of any sort. A third category of equal-protection cases, concededly more difficult to characterize, stands for the proposition that when governmental involvement in private discrimination reaches a level at which the State can be held responsible for the specific act of private discrimination, the strictures of the Fourteenth Amendment come into play. In dealing with this class of cases, the inquiry has been framed as whether the State has become "a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment." *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715, 725.

Given these latter contours of the equal-protection doctrine, the assessment of particular cases is often troublesome, as the Court itself acknowledges. *Ante,* pp. 378–379.

However, the present case does not seem to me even to approach those peripheral situations in which the question of state involvement gives rise to difficulties. See, *e. g., Evans* v. *Newton,* 382 U. S. 296; *Lombard* v. *Louisiana,* 373 U. S. 267. The core of the Court's opinion is that § 26 is offensive to the Fourteenth Amendment because it effectively *encourages* private discrimination. By focusing on "encouragement" the Court, I fear, is forging a slippery and unfortunate criterion by which to measure the constitutionality of a statute simply permissive in purpose and effect, and inoffensive on its face.

It is true that standards in this area have not been definitely formulated, and that acts of discrimination have been included within the compass of the Equal Protection Clause not merely when they were compelled by a state statute or other governmental pressures, but also when they were said to be "induced" or "authorized" by the State. Most of these cases, however, can be approached in terms of the impact and extent of affirmative state governmental activities, *e. g.,* the action of a sheriff, *Lombard* v. *Louisiana, supra;* the official supervision over a park, *Evans* v. *Newton, supra;* a joint venture with a lessee in a municipally owned building, *Burton* v. *Wilmington Parking Authority, supra.*[2] In

[2] In *McCabe* v. *Atchison, Topeka & Santa Fe R. Co.,* 235 U. S. 151, cited by the Court, the complaint of the Negro appellants was held to have been properly dismissed on the ground that its allegations were "altogether too vague and indefinite," *id.,* at 163. In dictum the Court stated that where a State regulated the facilities of a common carrier it could not constitutionally enact a statute that did not comply with the "separate but equal" doctrine. Whatever the implications of the Fourteenth Amendment may be as to common carriers, compare the opinions of Goldberg, J., concurring, and BLACK, J., dissenting, in *Bell* v. *Maryland,* 378 U. S. 226, 286,

situations such as these the focus has been on positive state cooperation or partnership in affirmatively promoted activities, an involvement that could have been avoided. Here, in contrast, we have only the straightforward adoption of a neutral provision restoring to the sphere of free choice, left untouched by the Fourteenth Amendment, private behavior within a limited area of the racial problem. The denial of equal protection emerges only from the conclusion reached by the Court that the implementation of a new policy of governmental neutrality, embodied in a constitutional provision and replacing a former policy of antidiscrimination, has the effect of lending encouragement to those who wish to discriminate. In the context of the actual facts of the case, this conclusion appears to me to state only a truism: people who want to discriminate but were previously forbidden to do so by state law are now left free because the State has chosen to have no law on the subject at all. Obviously whenever there is a change in the law it will have resulted from the concerted activity of those who desire the change, and its enactment will allow those supporting the legislation to pursue their private goals.

A moment of thought will reveal the far-reaching possibilities of the Court's new doctrine, which I am sure the Court does not intend. Every act of private discrimination is either forbidden by state law or permitted by it. There can be little doubt that such permissiveness—whether by express constitutional or statutory provision, or implicit in the common law—to some extent "encourages" those who wish to discriminate to do so. Under this theory "state action" in the form of laws

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318, nothing in *McCabe* would appear to have much relevance to the problem before us today.

Neither is there force in the Court's reliance on *Nixon* v. *Condon*, 286 U. S. 73, a voting case decided under the Fifteenth as well as the Fourteenth Amendment.

that do nothing more than passively permit private discrimination could be said to tinge *all* private discrimination with the taint of unconstitutional state encouragement.

This type of alleged state involvement, simply evincing a refusal to involve itself at all, is of course very different from that illustrated in such cases as *Lombard, Peterson, Evans,* and *Burton, supra,* where the Court found active involvement of state agencies and officials in specific acts of discrimination. It is also quite different from cases in which a state enactment could be said to have the obvious purpose of fostering discrimination. *Anderson* v. *Martin,* 375 U. S. 399. I believe the state action required to bring the Fourteenth Amendment into operation must be affirmative and purposeful, actively fostering discrimination. Only in such a case is ostensibly "private" action more properly labeled "official." I do not believe that the mere enactment of § 26, on the showing made here, falls within this class of cases.

III.

I think that this decision is not only constitutionally unsound, but in its practical potentialities short-sighted. Opponents of state antidiscrimination statutes are now in a position to argue that such legislation should be defeated because, if enacted, it may be unrepealable. More fundamentally, the doctrine underlying this decision may hamper, if not preclude, attempts to deal with the delicate and troublesome problems of race relations through the legislative process. The lines that have been and must be drawn in this area, fraught as it is with human sensibilities and frailties of whatever race or creed, are difficult ones. The drawing of them requires understanding, patience, and compromise, and is best done by legislatures rather than by courts. When

legislation in this field is unsuccessful there should be wide opportunities for legislative amendment, as well as for change through such processes as the popular initiative and referendum. This decision, I fear, may inhibit such flexibility. Here the electorate itself overwhelmingly wished to overrule and check its own legislature on a matter left open by the Federal Constitution. By refusing to accept the decision of the people of California, and by contriving a new and ill-defined constitutional concept to allow federal judicial interference, I think the Court has taken to itself powers and responsibilities left elsewhere by the Constitution.

I believe the Supreme Court of California misapplied the Fourteenth Amendment, and would reverse its judgments, and remand the case for further appropriate proceedings.

Syllabus.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 57. Argued April 13 and 17, 1967.—Decided May 29, 1967.*

Faced with the explosive growth of trailer-on-flatcar (TOFC or "piggyback") service the Interstate Commerce Commission (ICC) instituted a general investigation of all aspects of that service. Following hearings the ICC promulgated rules providing that (1) "TOFC service, if offered by a rail carrier through its open-tariff publications, shall be made available" at the same charge to all other persons (Rule 2), and (2) motor and water carriers, and freight forwarders, "may utilize TOFC service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier" (Rule 3). In a suit brought by railroads and freight forwarders a three-judge District Court set these rules aside. *Held:*

1. "[I]n light of the mandate of the National Transportation Policy, the Commission had authority derived from the common-carrier obligations of the railroads as reflected in §§ 1 (4), 2, and 3 (1) of the Interstate Commerce Act to promulgate Rule 2 requiring that any railroad offering TOFC service through its open-tariff publications must make that service available 'to any person' on nondiscriminatory terms." Pp. 406–413.

(a) "The fact that the person tendering traffic is a competitor does not permit the railroad to discriminate against him or in his favor." Pp. 406–408.

(b) "In *Seatrain* [*United States* v. *Pennsylvania R. Co.*, 323 U. S. 612 (1945)], this Court emphatically rejected the analysis upon which the District Court here essentially based its position—that since the Act regulates rail, motor, and water carriers separately, in Titles I, II, and III, the Commission may not compel the mutual furnishing of services and facilities other than as expressly directed." Pp. 408–411.

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*Together with No. 59, *National Automobile Transporters Association of Detroit* v. *Atchison, Topeka & Santa Fe Railway Co. et al.*, and No. 60, *United States et al.* v. *Atchison, Topeka & Santa Fe Railway Co. et al.*, also on appeal from the same court.

(c) The proviso to § 3 (1) of the Act "certainly was not intended . . . to grant license to discriminate against traffic *offered to the railroad* by another carrier." "The proviso means that the prohibition against 'undue or unreasonable preference or advantage' is not to be construed to forbid practices, otherwise lawful, solely because they operate to the prejudice of another carrier." Pp. 411–412.

2. "[T]here is no adequate reason to construe the Act so as to deprive the Commission of the power to authorize the carriers by motor vehicle to use TOFC when that service is offered by railroads to the public on open tariff." Pp. 413–420.

(a) The District Court and the appellees concede that a motor carrier may utilize TOFC with the consent of the railroad concerned. Because such consensual utilization of open-tariff TOFC differs importantly from a voluntary motor-rail through route and joint rate arrangement under § 216 (c) of the Act, the exception for consensual TOFC undermines the argument that motor carriers are not authorized under their franchise to substitute rail transportation for transportation by road. There are other circumstances, too, in which a motor carrier may use the services of another mode of transportation. "We may properly assume, therefore, that the Act cannot be construed to require that the trucker must always transport its cargo exclusively by road." Pp. 413–415.

(b) Although some prior ICC decisions have held that railroad concurrence is essential to motor carrier use of TOFC service, "the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice." Pp. 415–416.

(c) Although "the attention of the Congress had been called to the need for action to secure the relief which the Commission subsequently granted in its rules," the resulting legislative history does not demonstrate "a congressional construction of the meaning of the statute . . . ." Nor is the ICC's advocacy of legislation "evidence of an administrative interpretation of the Act which should tilt the scales" against the ICC's conclusion in this case as to its authority. Pp. 416–418.

(d) "The mere fact that the truckers, by reason of the Commission's Rules 2 and 3, may utilize open-tariff TOFC service, where offered generally, certainly does not convert their activity into freight forwarding, in conflict with the Act." Pp. 418–420.

3. "The controlling fact of the matter is that all piggyback service is, by its essential nature, bimodal. . . . In the absence of congressional direction, there is no basis for denying to the ICC the power to allocate and regulate transportation that partakes of both elements; and there is no basis whatever for denying to the Commission the power to carry out its responsibilities under the National Transportation Policy. . . ." Pp. 420–422.

244 F. Supp. 955, reversed.

Richard R. Sigmon argued the cause for appellants in Nos. 57 and 59. With him on the brief were *Peter T. Beardsley, Harry J. Jordan, R. Edwin Brady, Albert B. Rosenbaum, Bryce Rea, Jr., James E. Wilson, Guy H. Postell, Ferdinand Born, LeGrand A. Carlston, F. H. Lynch, Jr., George S. Dixon, Roland Rice, Homer S. Carpenter* and *John S. Fessenden. Robert W. Ginnane* argued the cause for the United States et al. in No. 60. With him on the brief were *Solicitor General Marshall, Assistant Attorney General Turner, Richard A. Posner, Howard E. Shapiro* and *Fritz R. Kahn.*

Thormund A. Miller argued the cause for the Western and Southeastern Railroad appellees. With him on the brief were *Amos M. Mathews, J. D. Feeney, Robert F. Munsell* and *James W. Hoeland. Francis M. Shea* argued the cause for appellees Southern Railway Co. et al. With him on the brief were *William H. Dempsey, Jr., Walter J. Myskowski, W. Graham Claytor, Jr.,* and *James A. Bistline. Paul R. Duke* argued the cause for the Eastern Railroad appellees. With him on the brief were *Kemper A. Dobbins* and *Eugene E. Hunt. D. Robert Thomas* argued the cause for the Freight Forwarder appellees. With him on the brief was *Giles Morrow.*

MR. JUSTICE FORTAS delivered the opinion of the Court.

These three cases present the following question: Does the Interstate Commerce Commission have authority to promulgate rules providing (1) that railroads which offer trailer-on-flatcar (TOFC or "piggyback") service to the

public under open-tariff publications must make such service available on the same terms to motor and water common and contract carriers, and (2) that motor and water carriers may, subject to certain conditions, utilize TOFC facilities in the performance of their authorized service? *Ex parte 230, Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, 322 I. C. C. 301 (1964).

A three-judge district court, convened under 28 U. S. C. §§ 1336, 2284, 2321–2325, at the request of various railroads and freight forwarders, set aside the rules which the ICC had promulgated in a rulemaking proceeding initiated on its own motion. 244 F. Supp. 955 (D. C. N. D. Ill. 1965). The case is here on direct appeal. 28 U. S. C. §§ 1253 and 2101 (b). 384 U. S. 902 (1966).

The appellees are the railroads and freight forwarders who initiated the District Court proceeding. The appellants are the United States and the ICC (No. 60), together with the American Trucking Associations, Inc., et al. (No. 57), and the National Automobile Transporters Association (No. 59), which intervened below as defendants.

More specifically, the issue presented is the validity of Rules 2 and 3, promulgated by the Commission in *Ex parte 230, supra.* 49 CFR §§ 500.2 and 500.3 (Supp. 1967). Rule 2 provides that "TOFC service, if offered by a rail carrier through its open-tariff publications, shall be made available" at the same charge to all other persons. In substance, it is a paraphrase of § 2 of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. § 2 (hereinafter cited only to U. S. C.). Rule 3 provides that, with certain qualifications and subject to certain conditions, "motor common and contract carriers, water common and contract carriers, and freight forwarders may utilize TOFC service in the performance of all or any portion of their authorized service

through the use of open-tariff TOFC rates published by a rail carrier." The District Court held that the Commission has no authority to compel railroads to make open-tariff TOFC service available to such carriers, and that such carriers may not be authorized to use TOFC except if and as the railroad consents.

The background of the controversy may be briefly described. The growth of trailer-on-flatcar service has been "explosive" since the latter half of the 1950's.[1] From the time of passage in 1935 of Part II of the Act regulating motor carriers, until the institution of the present proceeding, the Commission appears to have regarded trailer-on-flatcar service not as bimodal, but as an adjunct of transportation by railroad—as a facility essentially of, by and for the railroads. This attitude is summed up by the ICC's definition of TOFC in 1954 in *Movement of Highway Trailers by Rail*, 293 I. C. C. 93 (the so-called *New Haven* case), which provided the basic legal framework upon which the development of TOFC traffic has been based. In that case, the Commission described TOFC or piggyback service as transportation of "a freight-laden trailer secured to a flatcar, which in turn is coupled in a train being drawn by a locomotive

[1] 322 I. C. C., at 305. The Commission observed, "There can be little doubt that piggybacking has been a decisive factor in returning to the railroads a substantial volume of traffic that previously had been moving by other modes of transportation, private and for-hire." *Id.*, at 307. It found that "In 1957 a total of 57 class I railroads were participating in TOFC tariffs; in mid-1963 there were 100 class I roads doing so. In 1955, 32 railroads reported a total of 168,150 TOFC carloadings, for a weekly average of 3,234. In 1959, 50 reporting railroads showed totals of 415,156 annual and 7,984 weekly average carloadings for TOFC. For 1963, 63 reporting railroads indicated continued growth to approximately 797,500 loaded TOFC cars, a weekly rate of approximately 12,700 [15,300] loadings." *Id.*, at 309.

over steel rails laid on the railroad's right-of-way . . . ." *Id.*, at 100–101.[2]

Even prior to the *New Haven* case, beginning in 1939, in *Substituted Freight Service*, 232 I. C. C. 683, it was the Commission's position that a railroad could grant or deny TOFC service to common carriers by motor.[3] Even if the railroad offered such service generally to the public, it could withhold it from for-hire motor carriers. Except for limited uses of rail open tariffs permitted by certain railroads,[4] contract and common carriers by motor participated in piggyback service only by agreement, including through route-joint rate arrangements between a railroad and a trucker (see Plan V, *infra*), and railroad acceptance of trailers or containers of truckers, the shipment moving under motor carrier tariffs and the railroad's compensation being based upon a division of charges arrived at through negotiations between the carriers (Plan I, *infra*). These arrangements had to be voluntary for it has been the prevailing view that the railroads, as common carriers, had no duty to service truckers under their open tariffs, and, although § 216 (c), 49 U. S. C. § 316 (c), authorizes motor common carriers to establish through routes and joint rates with rail common carriers, the Commission had no power to compel such joint arrangements.

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[2] For a statement of the Commission's earlier position, prior to enactment of Part II of the Interstate Commerce Act, see *Trucks on Flat Cars Between Chicago and Twin Cities*, 216 I. C. C. 435 (1936), where it was held that motor carriers, like any other competing mode of unregulated transportation (compare *ICC* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235 (1911)), were entitled to utilize a published piggyback tariff.

[3] Section 1 (4) of the Act, 49 U. S. C. § 1 (4), imposes a duty on railroads to establish joint through routes and rates with water carriers, but there is no such provision with respect to motor carriers. See § 216 (c), 49 U. S. C. § 316 (c).

[4] Cf. *Gordon's Transports, Inc.* v. *Strickland Transp. Co.*, 318 I. C. C. 395, 396–397, sustained *sub nom. Strickland Transportation Co.* v. *United States*, 219 F. Supp. 618, 620 (D. C. N. D. Tex. 1963).

According to the Commission, five basic forms of piggyback service evolved (322 I. C. C., at 304–305, 309–312). They are:

Plan I (Joint Intermodal):

Railroad movement of trailers or containers of motor common carriers, with the shipment moving on one bill of lading and billing being done by the trucker. Traffic moves under rates in regular motor carrier tariffs, and the railroad's compensation is arrived at by negotiation between the two carriers.

Plan II (All-Rail):

Door-to-door service performed by the railroad, which moves its own trailers or containers on flatcars under open tariffs usually similar to those of truckers.

Plan III (All-Rail):

Ramp-to-ramp rates to private shippers and freight forwarders, based on a flat open-tariff charge, regardless of the contents of trailers or containers, which are usually owned or leased by freight forwarders or shippers. No pick-up or delivery is performed by the railroad.

Plan IV (All-Rail):

Flat open-tariff charge for loaded- or empty-car movement, the railroad furnishing only power and rails. Shipper or forwarder furnishes a trailer or container-loaded flatcar, either owned or leased.

Plan V (Joint Intermodal):

Joint railroad-truck or other combination of coordinated service rates. Either mode may solicit traffic for through movement, and traffic moves on originating carrier's bill of lading.

While data are not available precisely to define the growth of traffic under the various plans, the evidence indicates that major growth has been primarily in the

all-rail, open-tariff plans—that is, plans under which traffic moves at rail rates and on rail billings. The Commission's summary of responses to piggyback questionnaires, contained in the Record, shows that virtually all of the reporting railroads participate in Plans II and III and about three-fourths participate in Plan IV. However, only "somewhat more than half" of the reporting railroads participate in trucker-rail arrangements under either Plan I or V, and traffic in Plan V (joint railroad-truck rates-through routes) "generally is extremely limited." A number of the largest railroads do not offer to move trailers or containers for motor carriers on motor carrier bills of lading and billing under regular motor carrier tariffs (Plan I),[5] or offer it only for limited types of traffic such as automobiles, or only to their own subsidiaries. Over 80% of rail movement of motor carrier-rail piggyback is under Plan I. ICC Bur. of Econ., Piggyback Traffic Characteristics 21 (1966).

Faced with the explosive growth of piggyback service on the basis of principles which had evolved in the infancy of the development of piggyback, the Commission by notice dated June 29, 1962, commenced this proceeding which was its "first general investigation of what is probably the most significant recent development in transportation—trailer-on-flatcar or piggyback service." 322 I. C. C., at 303. Proposed rules were furnished to participants, opportunity was given to all of them to file statements, and an examiners' report was filed. After exceptions and oral argument, the Commission rendered

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[5] There is "no Plan I service of any type available between midwest points east of the tier of states of Wyoming, Colorado, and New Mexico, on the one hand, and, on the other hand, points in the states west thereof. Transcontinental railroads operating between the latter points have elected not to offer any form of Plan I service to motor carriers between such points." Pacific Intermountain Express Co., Supplemental Statement of W. S. Pilling (R. 123).

its decision on March 16, 1964. The Commission stated that "It is our purpose and our hope to encourage the growth of this transportation phenomenon." 322 I. C. C., at 322. The rules which it prescribed incorporate the basic principles here at issue: that "when TOFC service is offered by a rail carrier to the public generally," it should likewise be available to motor or water common or contract carriers, in lieu of their authorized transportation between service points, or to for-hire carriers. *Id.*, at 336. These rules also include ancillary or implementing provisions which are not here at issue; for example, it is provided that the motor carrier must give notice in its tariff publication if TOFC is to be used, and the user of the water or motor carrier may specify "that in any particular instance TOFC service not be utilized" (49 CFR §§ 500.3 (b), (c), (d) (Supp. 1967)); and that these carriers may tender and receive traffic, TOFC, only at points that they are authorized to serve. *Id.*, § 500.3 (e).

The three-judge District Court concluded that Rules 2 and 3 (and Rule 5, *id.*, § 500.5, insofar as it amplified those Rules) exceeded the Commission's authority and set them aside. In substance it held that the Interstate Commerce Act did not forbid a railroad to refuse to carry the trailers or containers of a competing mode of carrier; that the structure and plan of the Act, as well as the specific absence of compulsory power to the Commission in § 216 (c), which authorizes voluntary joint rates and through routes by motor and rail carriers, indicated that the ICC is not at liberty to require the railroads to provide TOFC service to competing modes; that provisions of the Act regulating freight forwarders impelled the same conclusions; and that the Commission's long history of support for the position which its rules now repudiate, as well as legislative history, compelled rejection of the rules now promulgated. We disagree.

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I.

We first consider Rule 2, which raises the question whether the Commission may by rule require that if a railroad offers TOFC service to the public through its open-tariff publications, it must make that service available to "any person" without discrimination. We begin by noting the obvious fact that the Interstate Commerce Act codified the common-law obligations of railroads as common carriers. From the earliest days, common carriers have had a duty to carry all goods offered for transportation. See, *e. g., New Jersey Steam Nav. Co.* v. *Merchants' Bank,* 6 How. 344, 382–383 (1848). Refusal to carry the goods of some shippers was unlawful. Rates were required to be reasonable, but discrimination in the form of unequal rates as among shippers was not forbidden. In England, legislation to proscribe unequal rates, from which the antidiscrimination language of § 2 of the Interstate Commerce Act derives (*ICC* v. *Delaware, L. & W. R. Co.,* 220 U. S. 235, 253 (1911)), was enacted in 1845. The Railway Clauses Consolidation Act of 1845, 8 & 9 Vict., c. 20, § LXXXVI *et seq.* In this country, the railroads had a practical monopoly of freight transportation, and secret rebates, special rates to favored shippers, and discriminations flourished. It was this situation that led to enactment of the Interstate Commerce Act in 1887. 1 Sharfman, The Interstate Commerce Commission 17–19 (1931); *Louisville & N. R. Co.* v. *United States,* 282 U. S. 740, 749–750 (1931).

Section 1 (4) of the Act, 49 U. S. C. § 1 (4), provides that it shall be the duty of common carriers by rail to provide transportation "upon reasonable request therefor" and to establish just and reasonable rates. Section 2, 49 U. S. C. § 2, prohibits discriminatory rates or charges. Section 3 (1), 49 U. S. C. § 3 (1), forbids undue

preferences or advantages, and undue or unreasonable prejudices or disadvantages to any person, area or particular description of traffic. The Act does not contain any provision expressly exempting traffic offered by carriers by motor vehicle from these broad common-carrier obligations of the railroads. On the contrary, these sections of the Act, read in light of the historic obligations and duties of common carriers and the large number of decisions of the Commission, and of the courts in this country and in England, indicate, presumptively at least, that railroads may not offer the service of transporting trailers for other shippers and deny that service to motor carriers.[6] Indeed, as we have observed, the Commission's Rule 2 is practically a paraphrase of § 2 of the Act. It provides that if a rail carrier through its open-tariff publications offers TOFC services, it shall make the same available "to any person" at the same charge. It is, of course, of no consequence that the Act does not expressly command that the railroads furnish this service to motor carriers. Their obligation as common carriers is comprehensive and exceptions are not to be implied. The fact that the person tendering traffic is a competitor does not permit the railroad to discriminate against him or in his favor. See *ICC* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235 (1911) (unlawful for railroads to charge less-than-carload rates for carload shipments tendered by freight forwarders); *ICC* v. *Baltimore & O. R. Co.*, 225 U. S. 326 (1912) (lower rates

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[6] See, *e. g.*, *Great Western R. Co.* v. *Sutton*, L. R. 4 H. L. 226 (1869); *London & N. W. R. Co.* v. *Evershed*, 3 App. Cas. 1029 (1878); *Wight* v. *United States*, 167 U. S. 512 (1897); *ICC* v. *Baltimore & O. R. Co.*, 225 U. S. 326 (1912); *Louisville & N. R. Co.* v. *United States*, 282 U. S. 740 (1931); *Kansas City S. R. Co.* v. *United States*, 282 U. S. 760 (1931); *ICC* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235 (1911); *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344 (1940).

on coal shipped by another railroad for its own use as fuel held unlawful). Cf. *Wight* v. *United States*, 167 U. S. 512 (1897). As this Court said in *Delaware, L. & W. R. Co., supra:*

> "The contention that a carrier when goods are tendered to him for transportation can make the mere ownership of the goods the test of the duty to carry, or, what is equivalent, may discriminate in fixing the charge for carriage, not upon any difference inhering in the goods or in the cost of the service rendered in transporting them, but upon the mere circumstance that the shipper is or is not the real owner of the goods is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the rights of shippers as to demonstrate the unsoundness of the proposition by its mere statement." 220 U. S., at 252.

This Court was faced with an intermodal problem, comparable to that in the present cases, in *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612 (1945) (the *Seatrain* case). The railroads refused to interchange their freight cars with Seatrain, a water carrier, for interstate transportation by Seatrain in competition with the railroads. The ICC ordered the railroads to desist from this practice, and the railroads brought an action to set aside its order. The railroads contended that the Transportation Act of 1940, 54 Stat. 898, did not in "specific language" authorize the Commission to require them to furnish the disputed facility to a competing water carrier. But this Court rejected that contention. It said:

> "There is no language in the present Act which specifically commands that railroads must interchange their cars with connecting water lines. We cannot agree with the contention that the absence

> of specific language indicates a purpose of Congress not to require such an interchange. True, Congress has specified with precise language some obligations which railroads must assume. But all legislation dealing with this problem since the first Act in 1887, 24 Stat. 379, has contained broad language to indicate the scope of the law. The very complexities of the subject have necessarily caused Congress to cast its regulatory provisions in general terms. Congress has, in general, left the contents of these terms to be spelled out in particular cases by administrative and judicial action, and in the light of the Congressional purpose to foster an efficient and fair national transportation system. Cf. *Chicago, R. I. & P. R. Co.* v. *United States,* 274 U. S. 29, 36; *Interstate Commerce Commission* v. *Railway Labor Executives Assn.,* 315 U. S. 373, 376–377." 323 U. S., at 616.

In *Seatrain,* this Court emphatically rejected the analysis upon which the District Court here essentially based its position—that since the Act regulates rail, motor, and water carriers separately, in Titles I, II, and III, the Commission may not compel the mutual furnishing of services and facilities other than as expressly directed. Recognizing that in the case of water carriers (as distinguished from motor carriers), the Act specifically directs railroads to establish through routes with them, the Court held that this is not the end of the railroads' obligation or the limit of the Commission's power. On the contrary, the Court, relying on the National Transportation Policy (49 U. S. C. preceding § 1), held that the Act is designed "to provide a completely integrated interstate regulatory system over motor, railroad, and water carriers . . ." 323 U. S., at

618–619, and that the Commission therefore had powers commensurate with that goal. In this connection, the Court said:

> "The 1940 Transportation Act is divided into three parts, the first relating to railroads, the second to motor vehicles, and the third to water carriers. That Act, as had each previous amendment of the original 1887 Act, expanded the scope of regulation in this field and correlatively broadened the Commission's powers. The interrelationship of the three parts of the Act was made manifest by its declaration of a 'national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each.' The declared objective was that of 'developing, coordinating, and preserving a national transportation system by water, highway, and rail, . . . adequate to meet the needs of the commerce of the United States . . . .' Congress further admonished that 'all of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.' 54 Stat. 899." 323 U. S., at 616–617.

In view of this, we cannot accept arguments based upon arguable inference from nonspecific statutory language, limiting the Commission's power to adopt rules which, essentially, reflect its judgment in light of current facts as to the proper interrelationship of several modes of transportation with respect to an important new development. For example, § 216 (c), 49 U. S. C. § 316 (c), authorizes the railroads to enter into voluntary arrangements for through routes and joint rates with motor carriers. There is no Commission power to compel the railroads to do so, and it is argued that from this we

should derive a congressional intent that the ICC may not compel the railroads to furnish services to the motor carriers in any circumstances. There is no basis for this vast leap from a particular authorization to a pervasive prohibition. See our discussion of *Seatrain, supra.*

It is also argued that a proviso to § 3 (1) of the Act, 49 U. S. C. § 3 (1), demonstrates that Congress did not intend to inhibit the railroads from discriminating against motor carriers. This contention, strenuously supported, is without merit. Section 3 (1) broadly prohibits any common carrier by rail from giving "any undue or unreasonable preference" to any person, locality or type of traffic. It then sets forth this proviso: *"Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description." This is language more notable for its awkwardness than for its clarity; but it certainly was not intended, as appellees urge, to grant license to discriminate against traffic *offered to the railroad* by another carrier. We have noted above that this Court has clearly held that such discrimination is not permissible. Moreover, there is an intelligible meaning which can be ascribed to the proviso and which is consistent with its history. The proviso means that the prohibition against "undue or unreasonable preference or advantage" is not to be construed to forbid practices, otherwise lawful, solely because they operate to the prejudice of another carrier. It was in these terms that the language of the proviso was explained by Senator Wheeler, the bill's sponsor. The proviso was taken almost verbatim from § 216 (d) of the Motor Carrier Act, 1935, 49 Stat. 558 (now 49 U. S. C. § 316 (d)). Explaining it, Senator Wheeler said:

> "Paragraph (d) . . . prohibits unjust discrimination or undue prejudice or disadvantage. The com-

mittee has added a provision that this prohibition shall not be construed to apply to the traffic of any other carrier of whatever description.

"In other words, some of the truck and bus operators were afraid that the railroads would come in and complain, and we added this provision so as doubly to protect the truck and bus operators.

"*This provision is added to meet the objection of certain interests that the original paragraph might have been construed so as to make it unlawful for a motor carrier to charge a rate which would place a rail carrier or any other carrier at a disadvantage. This contention is not well founded* in our judgment inasmuch as the provisions of this paragraph are substantially the same as those in section 3 (1) of the Interstate Commerce Act, which has been in effect since 1887, and have always been interpreted as covering unequal and unjust treatment by a carrier of its patrons. However, as I said, to make assurance double sure, this provision was added." 79 Cong. Rec. 5656 (1935). (Italics added.)

Accordingly, we are remitted to consideration of the provisions of the Act which, in the most general terms, require the railroads to perform as common carriers. It is not our duty, of course, to concern ourselves with a nice evaluation of the arguments as to whether the Commission pursued the course of wisdom in ordering the railroads to make piggyback service available to motor carriers if it is offered to others on open-tariff rates. It is our task to scrutinize the Commission's authority, not the substance of its exercise. We conclude that, in light of the mandate of the National Transportation Policy, the Commission had authority derived from the common-carrier obligations of the railroads as reflected in §§ 1 (4), 2, and 3 (1) of the Act to promulgate Rule 2 requiring

that any railroad offering TOFC service through its open-tariff publications must make that service available "to any person" on nondiscriminatory terms. We come, then, to Rule 3.

II.

Rule 3, in general, authorizes "motor common and contract carriers, water common and contract carriers, and freight forwarders" to "utilize TOFC service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier." At the outset, as discussed above, we reject the contention that the railroads, despite their common-carrier obligations and the absence of an exception thereto in the Act, may exclude carriers by competing modes of transportation from access to their publicly offered services and facilities; and we do not accept the argument that § 216 (c), 49 U. S. C. § 316 (c), which authorizes voluntary through route and joint rate arrangements between railroads and truckers, implies that the railroads have no other obligation to motor carriers and that no other obligation may be imposed upon them by the ICC in this respect. That contention is refuted by the *Seatrain* case, *supra.*

It is strenuously contended, however, that whatever may be the railroads' duty, common carriers by motor vehicle may not be authorized to substitute transportation by rail for the transportation by road which is the basis of their franchise—except with the agreement of the railroad. It is this exception that saps the argument of some of its force, if not its fervor. One would assume that if the motor carriers are not authorized by their franchise under the Act to substitute transportation by rail for transportation by road, they could not do so with the consent of the railroads. But neither the railroads, most of which, by agreement, provide

TOFC service to some motor carriers, nor the freight forwarders take this position. Nor did the court below. None of them urges the invalidity of Plan I as presently in use, which provides for trucker utilization of TOFC service with the railroad's concurrence.[7] As the District Court put it: "The policy explicit in Sections 216 (c) [authorizing voluntary rail-truck through routes, discussed above] and 402 (a)(5) [49 U. S. C. § 1002 (a)(5), defining freight forwarders, discussed below], and implicit in the structure of the Interstate Commerce Act as a whole, does not allow a motor carrier to perform its authorized service simply by tendering the shipment to the railroad for transportation *without the railroad's concurrence.*" 244 F. Supp., at 967.[8] (Italics added.) As we have discussed, this "concurrence" of the railroads, where granted, permits truckers to use TOFC service not only pursuant to Plans I and V, *supra,* but also under Plan III and Plan IV, the latter being open-tariff arrangements. The argument of appellees and the reasoning of the District Court carefully concede that the motor carriers may, without violating the Act or their charters, utilize this substituted service.

But, regardless of this, there is no adequate reason to construe the Act so as to deprive the Commission of the power to authorize the carriers by motor vehicle to use TOFC when that service is offered by railroads to the public on open tariff. The Interstate Commerce

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[7] A suit attacking the validity of Plan I service is pending. *Lone Star Package Car Co.* v. *United States,* Civ. No. 4–355 (D. C. N. D. Tex.).

[8] In important respects, motor carrier use of open-tariff TOFC differs from a motor-rail through route-joint rate TOFC arrangement. Hence the District Court's exception for open-tariff TOFC where the railroad consents cannot be justified as based upon the voluntary through route and joint rate provision of the Act. § 216 (c), 49 U. S. C. § 316 (c).

Act defines a "common carrier by motor vehicle" as "any person which holds itself out to the general public to engage in . . . transportation by motor vehicle." 49 U. S. C. § 303 (a)(14). This does not exclude joint arrangements with water carriers or rail carriers, which are expressly permitted by § 216 (c) on a voluntary basis, and according to the appellants and the District Court it is not inconsistent with the use of open-tariff TOFC if the railroad is willing. Clearly, too, a trucker which utilizes a ferry to transport its trailer and its cargo is not violating the statute or its certificate. We may properly assume, therefore, that the Act cannot be construed to require that the trucker must always transport its cargo exclusively by road. Appellees and the District Court argue, however, that the following factors demonstrate that the Commission may not authorize motor carriers to use TOFC service on open tariffs: the long history of the Commission's construction and application of the Act contrary to its present position, the history of congressional consideration, and the provisions of the Act relating to freight forwarders.

It is true, as we have stated, that the Commission for over 25 years has insisted that railroad concurrence is essential for trucker use of TOFC services. In *Substituted Freight Service*, 232 I. C. C. 683, the Commission held that a person may not be both a carrier and a shipper as to the same service. See also *Ringsby Truck Lines, Inc.* v. *Atchison, T. & S. F. R. Co.*, 263 I. C. C. 139, 141 (1945); and the *New Haven* case, 293 I. C. C. 93, 104–105 (1954). But see the earlier contrary holding in *Trucks on Flat Cars Between Chicago and Twin Cities*, 216 I. C. C. 435 (1936). The Commission's Report argues that *Substituted Freight Service*, correctly understood, does not proscribe the kind of substituted service here at issue, "in which one common carrier service is substituted for another through the use of an

open-tariff rate of the carrier performing the substituted service—provided that proper notice is given in the tariff publication of the carrier using the substituted service." 322 I. C. C., at 333. The Commission also argues that its subsequent decisions, cited above, are based upon an incorrect view of the *Substituted Freight Service* case. And it cites *Greer Broker Application,* 23 M. C. C. 417 (1940), and *Stone's Exp., Inc., Common Carrier Application,* 32 M. C. C. 525 (1942), as consistent with its present reading of *Substituted Freight Service.* We do not rest upon this analysis because, in any event, we agree that the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. Compare *SEC* v. *Chenery Corp.,* 332 U. S. 194 (1947); *FCC* v. *WOKO,* 329 U. S. 223 (1946). In fact, although we make no judgment as to the policy aspects of the Commission's action, this kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.

It is true that the attention of the Congress had been called to the need for action to secure the relief which the Commission subsequently granted in its rules. In February 1962, the American Trucking Associations, in the course of oral argument in *Gordon's Transports, Inc.* v. *Strickland Transp. Co.,* 318 I. C. C. 395, sustained *sub nom. Strickland Transportation Co.* v. *United States,* 219 F. Supp. 618 (D. C. N. D. Tex. 1963), apparently

urged that motor carriers be allowed to utilize TOFC open tariffs. On April 5, 1962, President Kennedy sent a transportation message to Congress calling for legislative action to "[a]ssure all carriers the right to ship vehicles or containers on the carriers of other branches of the transportation industry at the same rates available to noncarrier shippers . . ." so that the various carriers would be placed "in a position of equality with freight forwarders and other shippers in the use of the promising and fast-growing piggyback and related techniques." H. R. Doc. No. 384, 87th Cong., 2d Sess., p. 5 (1962). Secretary of Commerce Hodges transmitted to Congress proposed legislation to implement the President's message. Hearings on S. 3242 and S. 3243 before the Senate Committee on Commerce, 87th Cong., 2d Sess., pt. 1, p. 13 (1962). See also Hearings on S. 1061 and S. 1062 before Surface Transportation Subcommittee of the Senate Committee on Commerce, 88th Cong., 1st Sess., pt. 1, p. 3 (1963). Bills were introduced in 1962 and 1963. See S. 3242 and H. R. 11584, 87th Cong., 2d Sess. (1962); S. 1062 and H. R. 4701, 88th Cong., 1st Sess. (1963). On June 29, 1962, the Commission instituted the present proceeding. It advised Congress of its action and of its intention to "resolve" the matter or, if it could not, to recommend appropriate legislation. Surface Transportation Subcommittee Hearings, *supra*, pt. 2, p. 801; Hearings on H. R. 4700 and H. R. 4701 before the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess., pt. 1, p. 32 (1963). Following this, requests came from the industry to Congress that it withhold legislative action pending the Commission's decision. See, *e. g.*, Hearings on H. R. 4700 and H. R. 4701, *supra*, pt. 1, p. 213; pt. 2, p. 991. We do not regard this as legislative history demonstrating a congressional construction of the meaning of the statute, nor do we find in it evidence of

an administrative interpretation of the Act which should tilt the scales against the correctness of the Commission's conclusions as to its authority to prescribe the present rules. The advocacy of legislation by an administrative agency—and even the assertion of the need for it to accomplish a desired result—is an unsure and unreliable, and not a highly desirable, guide to statutory construction. The possibility of its use to prove more than it means may, but should not, deter administrative agencies from seeking helpful clarification of authority or a fresh and specific congressional mandate.[9]

The final argument to which we must address ourselves is vigorously made by the freight forwarder appellees. Freight forwarding is authorized and regulated in Part IV of the Interstate Commerce Act (49 U. S. C. § 1001 *et seq.*). This Part was enacted in 1942 (56 Stat. 284). A freight forwarder is defined as "any person which (otherwise than as a carrier . . . [by rail, motor vehicle or water]) holds itself out to the general public as a common carrier to transport or provide transportation of property, . . . and which . . . (A) assembles and consolidates . . . shipments . . . and (B) assumes responsibility for the transportation of such property . . . and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of" a rail, motor vehicle or water carrier. § 402 (a)(5), 49 U. S. C. § 1002 (a)(5). It cannot perform the physical transportation except in its terminal areas. § 410 (h), 49 U. S. C. § 1010 (h). It assembles shipments, consolidates

[9] It should also be noted that the legislation proposed by the ICC itself (S. 3510 and H. R. 12362, 87th Cong., 2d Sess. (1962); S. 676 and H. R. 2088, 88th Cong., 1st Sess. (1963)) would have required railroads to establish motor-rail through routes and joint rates and granted the Commission power to compel such arrangements—which is quite different from entitling motor carriers to use railroad open tariffs.

them, ships them by common carrier (usually a railroad), receives them and separates and distributes them to individual consignees. The Act specifically provides that no permit to engage in freight forwarding shall be issued to any common carrier by rail, motor vehicle or water. § 410 (c), 49 U. S. C. § 1010 (c). But a freight forwarder may be controlled by such a carrier, or under common control with it, and the Act specifically provides that the Commission may not for this reason deny a permit to the freight forwarder. *Ibid.*

It is obvious that there is a good deal of overlap between the work of the freight forwarders and that of the other common carriers. The freight forwarders' argument here is that the Act authorizes only freight forwarders to engage in the assembly and consolidation of shipments and the subsequent use of rail facilities for transportation, and that permitting the truckers to engage in this sort of service, by means of TOFC on open tariffs, is to authorize them to engage in this service in violation of the Act's prohibition against licensing other carriers as freight forwarders.

Forwarders are presently permitted to utilize railroad open-tariff TOFC service. *Movement of Highway Trailers by Rail,* 293 I. C. C. 93, 111 (1954). They may even quote trailer-load rates in competition with truckers and with rails. *Eastern Express, Inc.* v. *United States,* 198 F. Supp. 256 (D. C. S. D. Ind.), aff'd, 369 U. S. 37 (1962). But railroads, within their terminal areas (§ 202 (c), 49 U. S. C. § 302 (c)), and truckers have also traditionally assembled, consolidated, and distributed cargo in connection with providing their authorized transportation services. The Act expressly exempts from the freight-forwarder provisions any person who performs these services—which are similar to those of freight forwarders—as a carrier subject to another part of the Act. § 402 (a)(5), 49 U. S. C. § 1002 (a)(5). The

House Report on Part IV makes it clear that the Part does not apply "with respect to transportation performed by . . . motor . . . carriers in accordance with the applicable provisions of the Interstate Commerce Act." H. R. Rep. No. 1172, 77th Cong., 1st Sess., p. 6 (1941).

The mere fact that the truckers, by reason of the Commission's Rules 2 and 3, may utilize open-tariff TOFC service, where offered generally, certainly does not convert their activity into freight forwarding, in conflict with the Act. It is clear that where the railroad agrees, the trucker may use this service, and that a motor vehicle common carrier may assemble, consolidate, transport by piggyback in these circumstances, and distribute after arrival at the railroad terminus. The fact that the Commission enlarges this additional possibility of transportation of the truckers' trailers may be a competitive fact of some significance, but it does not convert the truckers into freight forwarders, nor deprive the latter of the exclusive rights specified in the Act.

III.

The controlling fact of the matter is that all piggyback service is, by its essential nature, bimodal.[10] It partakes of both the railroad and the trucking functions. The proper allocation of these bimodal functions involves complex considerations. It is not and cannot be precise or mathematical. Railroads are not now confined to the

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[10] As the ICC observed: "What [those who object to open-tariff TOFC] overlook is that *all* TOFC service is inherently bimodal in that its basic characteristic is the combination of the inherent advantages of rail and motor transportation . . . ." 322 I. C. C., at 329. Thus, the District Court's view of the statutory compartmentalization of transportation as *either* rail *or* motor *or* water, fails to recognize the primary fact about TOFC, which in *any* of its varieties cannot be made to fit the District Court's rigid modal conceptualization.

rails. They operate trucks. They are permitted to assemble cargo and, if they so desire, to use their own trucks or subsidiary companies to do so. § 202 (c), 49 U. S. C. § 302 (c). Truckers are not now strictly confined to the highway. In the absence of congressional direction, there is no basis for denying to the ICC the power to allocate and regulate transportation that partakes of both elements; and there is no basis whatever for denying to the Commission the power to carry out its responsibilities under the National Transportation Policy, 54 Stat. 899 (1940), 49 U. S. C. preceding § 1, to "provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each . . . to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." [11] This Court has observed that "The National Transportation Policy, formulated by Congress, specifies in its terms that it is to govern the Commission in the administration and enforcement of all provisions of the Act," and the Court has styled the National Transportation Policy as "the yardstick by which the correctness of the Commission's actions will be measured." *Schaffer Transp. Co.* v. *United States,* 355 U. S. 83, 87–88 (1957). Here the Commission has found that "the inherent advantages of each mode of transportation can be given freest play through the highest degree of coordination, and . . . encouragement of such coordination is

[11] Cf. *United States* v. *Rock Island Co.,* 340 U. S. 419, 433 (1951): "Complete rail domination [over motor transportation] was not envisaged as a way to preserve the inherent advantages of each form of transportation."

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in the public interest." 322 I. C. C., at 330. This conclusion, and its implementation in the TOFC rules, has obvious importance to "adequate, economical, and efficient service" and to the "establishment and maintenance of reasonable charges for transportation services," which are mandates of the National Transportation Policy. We cannot sustain the District Court's ruling that the Commission lacked power to promulgate the rules here in issue.

Accordingly, the decision below is *Reversed.*

MR. JUSTICE BLACK and MR. JUSTICE STEWART would affirm the judgment of the District Court for the reasons stated in the opinion of District Court Judge Hoffman reported at 244 F. Supp. 955, 961–964.

MR. JUSTICE HARLAN, finding it impossible to escape the impact of the proviso to § 3 (1) of the Interstate Commerce Act, 49 U. S. C. § 3 (1), would, for reasons elaborated in the portion of Judge Hoffman's opinion dealing with that point, 244 F. Supp. 955, at 961–964, affirm the judgment of the District Court.

STOECKLE *v.* WOLKE.

APPEAL FROM THE SUPREME COURT OF WISCONSIN.

No. 1557, Misc. Decided May 29, 1967.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

SWEET BRIAR INSTITUTE *v.* BUTTON ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA.

No. 1106. Decided May 29, 1967.

Reversed and remanded.

Frank G. Davidson, Jr., and *Thomas S. Currier* for appellant.

Robert Y. Button, Attorney General of Virginia, *pro se*, and *R. D. McIlwaine III*, Assistant Attorney General, for appellees.

PER CURIAM.

The judgment of the United States District Court for the Western District of Virginia is reversed. *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411 (1964). The case is remanded for consideration on the merits. Section 202 of the Civil Rights Act of 1964, 78 Stat. 244, 42 U. S. C. § 2000a–1. *Kline* v. *Burke Construction Co.*, 260 U. S. 226.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART would affirm the judgment.

CEPERO *v.* INDUSTRIAL COMMISSION OF PUERTO RICO.

APPEAL FROM THE SUPREME COURT OF PUERTO RICO.

No. 1565, Misc. Decided May 29, 1967.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

UNITED STATES *v.* CONTINENTAL OIL CO.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO.

No. 450. Decided May 29, 1967.

Vacated and remanded.

Solicitor General Marshall, Assistant Attorney General Turner, Robert B. Hummel, Jerry Z. Pruzansky and *Lawrence W. Somerville* for the United States.

PER CURIAM.

The judgment is vacated and the case remanded to the United States District Court for the District of New Mexico for further consideration in light of *United States* v. *Pabst Brewing Co.*, 384 U. S. 546.

CEPERO *v.* COLON ET AL.

APPEAL FROM THE SUPREME COURT OF PUERTO RICO.

No. 1606, Misc. Decided May 29, 1967.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

MARKIS *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 43. Decided May 29, 1967.*

Certiorari granted; No. 43, 352 F. 2d 860, No. 64, 353 F. 2d 672, vacated and remanded.

Alfred Belinkie for petitioner in No. 43. *W. Paul Flynn* for petitioner in No. 64.

Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg and *Marshall Tamor Golding* for the United States in No. 43. *Solicitor General Marshall* for the United States in No. 64.

PER CURIAM.

The petitions for writs of certiorari are granted, the judgments vacated and the cases remanded to the United States District Court for the District of Connecticut for a new trial, should the Government seek to prosecute petitioners anew. *Nardone* v. *United States*, 302 U. S. 379; *Nardone* v. *United States*, 308 U. S. 338.

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*Together with No. 64, *Moretti* v. *United States*, also on petition for writ of certiorari to the same court.

DELANEY *v.* FLORIDA.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 1213. Decided May 29, 1967.

190 So. 2d 578, appeal dismissed.

Alfred I. Hopkins, Irma Robbins Feder and *Richard Yale Feder* for appellant.

Earl Faircloth, Attorney General of Florida, and *Reeves Bowen,* Assistant Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.

PATTERSON ET AL. *v.* VIRGINIA ELECTRIC & POWER CO.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 1572, Misc. Decided May 29, 1967.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

SCHACKMAN ET AL. *v.* ARNEBERGH, CITY ATTORNEY FOR THE CITY OF LOS ANGELES, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

No. 1186. Decided May 29, 1967.

258 F. Supp. 983, 996, appeal dismissed.

Burton Marks for appellants.

Roger Arnebergh, pro se, Bourke Jones and *Robert B. Burns* for appellees Arnebergh et al.; *Harold W. Kennedy, George Wakefield* and *Martin E. Weekes* for appellees Younger et al.; and *Thomas C. Lynch,* Attorney General of California, *pro se,* and *A. Barry Cappello,* Deputy Attorney General, for appellee Lynch.

PER CURIAM.

Appellants seek review by this Court of the refusal by the District Court to convene a three-judge District Court pursuant to 28 U. S. C. §§ 2281–2284. We have held that such review is available in the Court of Appeals, *Idlewild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U. S. 713, and not in this Court. *Buchanan* v. *Rhodes,* 385 U. S. 3.

The motion to dismiss is granted and the appeal is dismissed for lack of jurisdiction.

UDALL, SECRETARY OF THE INTERIOR *v.* FEDERAL POWER COMMISSION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 463. Argued April 11, 1967.—Decided June 5, 1967.*

Pacific Northwest Power Co. (a joint venture of four private power companies) and Washington Public Power Supply System, allegedly a "municipality," applied to the Federal Power Commission (FPC) for mutually exclusive licenses to construct hydroelectric power projects at High Mountain Sheep, on the Snake River. On the Snake-Columbia waterway between High Mountain Sheep and the ocean eight hydroelectric dams have been built and another authorized, all federal projects. Section 7 (b) of the Federal Water Power Act of 1920 provides that whenever, in the FPC's judgment, the development of water resources for public purposes should be undertaken by the United States itself, the FPC shall not approve any application for any project affecting such development, but shall cause to be made such necessary examinations, reports, plans, and cost estimates and "shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development." Before a hearing on the license applications the FPC asked for the views of the Secretary of the Interior, who urged postponement of either project until means of fish protection were studied. The hearings went forward, and after the record was closed, the Secretary wrote the FPC urging it to recommend to Congress the federal construction of the project. The FPC reopened the record to permit the parties to file supplemental briefs in response to the letter. The Examiner then recommended that Pacific Northwest receive the license. The Secretary, after asking for leave to intervene and file exceptions, filed exceptions and made oral argument. The FPC in 1964 affirmed the Examiner, stating that "the record supports no reason why federal development should be superior," and "there is no evidence in the record presented by [the Secretary] to support his position." The Secretary petitioned for a rehearing and a reopening of the

*Together with No. 462, *Washington Public Power Supply System* v. *Federal Power Commission et al.*, also on certiorari to the same court, argued April 11–12, 1967.

record to permit him to supply the evidentiary deficiencies. A rehearing but not a reopening was granted and the FPC reaffirmed its decision. The Court of Appeals upheld the FPC's decision. *Held:*

1. Although the issue of federal development of water resources must, pursuant to § 7 (b) of the Federal Power Act, be evaluated by the FPC in connection with its consideration of the issuance of any license for a hydroelectric project, the issue has not been explored in the record herein. Pp. 434–450.

(a) The applicants introduced no evidence addressed to the issue and the FPC by its rulings on the Secretary's applications to intervene and reopen precluded itself from having the informed judgment that § 7 (b) commands. P. 434.

(b) If another dam is to be built, the question whether it should be under federal auspices looms large, in view of the number of federal projects on the Snake-Columbia waterway and the effect of the operation of a new dam on the vast river complex. Pp. 434–435.

(c) Under § 10 (a) of the Act the FPC must protect "recreational purposes," and by § 2 of the 1965 Anadromous Fish Act the Secretary comes before the FPC with a special mandate to appear, intervene, and introduce evidence on the proposed river development program, and to participate fully in the administrative proceedings. Pp. 436–440.

(d) The wildlife conservation aspect of the project must be explored and evaluated. Pp. 443–444.

(e) The urgency of the hydroelectric power project, discounted by the Secretary, was not fully explored, especially in view of the probable future development of other energy sources. Pp. 444–448.

(f) The determinative test is whether the project will be in the public interest, and that determination can be made only after an exploration of all relevant issues. P. 450.

2. No opinion is expressed on the contention of Washington Public Power Supply System that it is a "municipality" within the meaning of § 7 (a) of the Federal Power Act and entitled to a statutory preference, an issue which may or may not survive the remand. Pp. 450–451.

123 U. S. App. D. C. 209, 358 F. 2d 840, vacated and remanded in No. 462, and reversed and remanded in No. 463.

Louis F. Claiborne argued the cause for petitioner in No. 463. With him on the brief were *Solicitor General Marshall, Assistant Attorney General Weisl, Richard A. Posner, Roger P. Marquis, S. Billingsley Hill, Frank J. Barry, Edward Weinberg, Harry Hogan* and *Ernest J. London. Northcutt Ely* argued the cause and filed briefs for petitioner in No. 462.

Richard A. Solomon argued the cause for respondent Federal Power Commission in both cases. With him on the brief were *Howard E. Wahrenbrock, Peter H. Schiff* and *Joel Yohalem. Hugh Smith* argued the cause for respondents Pacific Northwest Power Co. et al. in both cases. With him on the briefs were *Francis M. Shea, William H. Dempsey, Jr., Ralph J. Moore, Jr.,* and *John R. Kramer. Robert Y. Thornton,* Attorney General, and *Richard W. Sabin, Dale T. Crabtree* and *Leon L. Hagen,* Assistant Attorneys General, filed a brief for the State of Oregon, *Allan G. Shepard,* Attorney General of Idaho, and *T. J. Jones III* filed a brief for the Idaho Fish and Game Commission, *C. Frank Reifsnyder* filed a brief for the Idaho Wildlife Federation, and *Joseph T. Mijich* filed a brief for the Washington State Sportsmen's Council, Inc., et al., respondents in both cases.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The Federal Power Commission has awarded Pacific Northwest Power Company (a joint venture of four private power companies) a license to construct a hydroelectric power project at High Mountain Sheep, a site on the Snake River, a mile upstream from its confluence with the Salmon. 31 F. P. C. 247, 1051. The Court of Appeals approved the action, 123 U. S. App. D. C. 209, 358 F. 2d 840; and we granted the petitions for certiorari. 385 U. S. 926, 927.

The primary question in the cases involves an interpretation of § 7 (b) of the Federal Water Power Act of 1920, as amended by the Federal Power Act, 49 Stat. 842, 16 U. S. C. § 800 (b), which provides:

> "Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development."

The question turns on whether § 7 (b) requires a showing that licensing of a private, state, or municipal agency [1]

[1] Section 4 of the Act provides in part:

"The Commission is hereby authorized and empowered—

"(a) To make investigations and to collect and record data concerning the utilization of the water resources of any region to be developed, the water-power industry and its relation to other industries and to interstate or foreign commerce, and concerning the location, capacity, development costs, and relation to markets of power sites, and whether the power from Government dams can be advantageously used by the United States for its public purposes, and what is a fair value of such power, to the extent the Commission may deem necessary or useful for the purposes of this Act.

. . . . . .

"(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign

is a satisfactory alternative to federal development. We put the question that way because the present record is largely silent on the relative merits of federal and non-federal development. What transpired is as follows:

Both Pacific Northwest and Washington Public Power Supply System, allegedly a "municipality" under § 4 (e) and under § 7 (a) of the Act,[2] filed applications for licenses on mutually exclusive sites; and they were consolidated for hearing. Before the hearing the Commission solicited the views of the Secretary of the Interior. The Secretary urged postponement of the licensing of either project while means of protecting the salmon and other fisheries were studied. That was on March 15, 1961. But the hearings went forward and on June 28, 1962, after the record before the Examiner was closed, but before he rendered his decision, the Secretary wrote the Commission urging it to recommend to Congress the consideration of federal construction of High Mountain Sheep. The Commission reopened the record to allow the Secretary's letter to be incorporated and invited the parties to file supplemental briefs in response to it. On October 8, 1962, the Examiner rendered his decision, recommending that Pacific Northwest receive the license. He disposed of the

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nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided . . . ." 49 Stat. 839, 840, 16 U. S. C. §§ 797 (a), (e).

[2] See n. 1, *supra*, for § 4 (e). Section 7 (a) of the Act provides:

"In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 15 hereof the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region . . . ." 49 Stat. 842, 16 U. S. C. § 800 (a).

issue of federal development on the ground that there "is no evidence in this record that Federal development will provide greater flood control, power benefits, fish passage, navigation or recreation; and there is substantial evidence to the contrary."

The Secretary asked for leave to intervene and to file exceptions to the Examiner's decision.[3] The Commission allowed intervention "limited to filing of exceptions to the Presiding Examiner's decision and participation in such oral argument as might subsequently be ordered."

The Secretary filed exceptions and participated in oral argument. The Commission on February 5, 1964, affirmed the Examiner saying that it agreed with him "that the record supports no reason why federal development should be superior," observing that "[w]hile we have extensive material before us on the position of the Secretary of the Interior, there is no evidence in the record presented by him to support his position." 31 F. P. C., at 275.

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[3] The Secretary argued that federal development of High Mountain Sheep is necessary because (1) hydraulic and electrical coordination with other Columbia River Basin projects, particularly the federal dams already or to be constructed on the downstream sites, could be more effectively achieved if High Mountain Sheep is a part of the federal system; (2) federal development will assure maximum use of the federal northwest transmission grid, thus contributing to maximum repayment of the federal investment in transmission, which will, in turn, redound to the benefit of the power consumers; (3) federal development would provide greater flexibility and protection in the management of fish resources; (4) flood control could better be effected by flexible federal operation; (5) storage releases for navigation requirements could be made under federal ownership and supervision with less effect on power supply; (6) federal development can better provide recreational facilities for an expanding population. The Secretary noted, however, that immediate construction of the project would produce an excess of power in the Pacific Northwest which would cause large losses to Bonneville Power Administration and severe harm to the region's economy.

It went on to say that it found "nothing in this record to indicate" that the public purposes of the dam (flood control, etc.) would not be served as adequately by Pacific Northwest as they would under federal development. And it added, "We agree that the Secretary (or any single operator) normally would have a superior ability to co-ordinate the operations of HMS with the other affected projects on the river. But there is no evidence upon which we can determine the scope or the seriousness of this matter in the context of a river system which already has a number of different project operators and an existing co-ordination system, i. e., the Northwest Power Pool." *Id.*, at 276–277.

The Secretary petitioned for a rehearing, asking that the record be opened to permit him to supply the evidentiary deficiencies. A rehearing, but not a reopening of the record, was granted; and the Commission shortly reaffirmed its original decision with modifications not material here.

The issue of federal development has never been explored in this record. The applicants introduced no evidence addressed to that question; and the Commission denied the Secretary an opportunity to do so though his application was timely. The issue was of course briefed and argued; yet no factual inquiry was undertaken. Section 7 (b) says "Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself," the Commission shall not approve other applications. Yet the Commission by its rulings on the applications of the Secretary to intervene and to reopen precluded it from having the informed judgment that § 7 (b) commands.

We indicate no judgment on the merits. We do know that on the Snake-Columbia waterway between High

Mountain Sheep and the ocean, eight hydroelectric dams have been built and another authorized. These are federal projects; and if another dam is to be built, the question whether it should be under federal auspices looms large. Timed releases of stored water at High Mountain Sheep may affect navigability; they may affect hydroelectric production of the downstream dams when the river level is too low for the generators to be operated at maximum capacity; they may affect irrigation; and they may protect salmon runs when the water downstream is too hot or insufficiently oxygenated. Federal versus private or municipal control may conceivably make a vast difference in the functioning of the vast river complex.[4]

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[4] Various federal agencies have been long engaged in the development of a comprehensive plan for the improvement of the Middle Snake. As early as 1948 the Secretary of the Interior submitted a comprehensive plan for the development of water resources of the Columbia River Basin. In 1949 the Corps of Engineers submitted a comprehensive plan for the development of the Columbia River Basin. H. R. Doc. No. 531, 81st Cong., 2d Sess., Vol. 1, pp. 1–3, Vol. 4, pp. 1429, 1482, Vol. 6, p. 2509. The plan recommended, in part, federal construction of nine run-of-the-river dams downstream from High Mountain Sheep and a regulating reservoir for the nine dams at Hells Canyon on the upper Snake. The nine dams were all authorized by Congress and have been or, in one case, will be constructed as federal projects in accordance with the plan. Hells Canyon was later licensed for private development, and, according to the Secretary of the Interior, without adequate regulating facilities. The Corps of Engineers and the Secretary of the Interior then recommended that the federal regulating dam be built, after further study, at High Mountain Sheep—the last suitable site. H. R. Doc. No. 403, 87th Cong., 2d Sess., Vol. 1, pp. iv, viii–ix, 260. Though it is not contended that congressional authorization of the nine federal dams downstream may have pre-empted the Commission's authority to license High Mountain Sheep for private development (cf. *Chapman* v. *Federal Power Comm'n*, 345 U. S. 153), it is argued that Congress appropriated vast sums for federal

Beyond that is the question whether any dam should be constructed.

As to this the Secretary in his letter to the Commission dated November 21, 1960, in pleading for a deferment of consideration of applications stated:

> "In carrying out this Department's responsibility for the protection and conservation of the vital Northwest anadromous fishery resource and in light of the fact that the power to be available as a result of ratification of the proposed Columbia River treaty with Canada will provide needed time which can be devoted to further efforts to resolve the fishery problems presently posed by these applications, we believe that it is unnecessary at this time and for some years to come to undertake any project in this area.
>
> "You may be assured that the Fish and Wildlife Service of this Department will continue, with renewed emphasis, the engineering and research studies that must be done before we can be assured that the passage of anadromous fish can be provided for at these proposed projects."

Since the cases must be remanded to the Commission, it is appropriate to refer to that aspect of the cases.

Section 10 (a) of the Act [5] provides that "the project

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development of the Columbia River Basin's hydroelectric resources in accordance with an overall plan that contemplated that the key structure in the system would be federally operated and that the downstream dams can be efficiently operated only if High Mountain Sheep is federally operated.

[5] "All licenses issued under this Part shall be on the following conditions:

"(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of inter-

adopted" shall be such "as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway . . . and for other beneficial public uses, including *recreational* purposes." (Emphasis added.)

The objective of protecting "recreational purposes" means more than that the reservoir created by the dam will be the best one possible or practical from a recreational viewpoint. There are already eight lower dams on this Columbia River system and a ninth one authorized; and if the Secretary is right in fearing that this additional dam would destroy the waterway as spawning grounds for anadromous fish (salmon and steelhead) or seriously impair that function, the project is put in an entirely different light. The importance of salmon and steelhead in our outdoor life as well as in commerce [6] is so great that there certainly comes a time when their destruction might necessitate a halt in so-called "improvement" or "development" of waterways. The destruction of anadro-

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state or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval." 49 Stat. 842, 16 U. S. C. § 803 (a).

[6] In 1966 the value of the Pacific salmon catch was over $67,000,000 and in 1965 over $65,000,000. United States Department of Interior, Fish & Wildlife Service, Fisheries of the United States, 1966, p. 2. As noted by the Commission, "the Columbia River is the greatest producer of Pacific salmon and steelhead trout in the United States." "Columbia River salmon have been important in the development of the Pacific Northwest for almost a century." "The commercial catch of Columbia River salmon is estimated to be worth $12,000,000 annually and the sport fishing attributable to the Salmon River alone . . . may be worth as much as $8 million a year." 31 F. P. C., at 259.

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mous fish in our western waters is so notorious [7] that we cannot believe that Congress through the present Act authorized their ultimate demise.

We need not speculate as to what the 1920 purpose may have been. For the 1965 Anadromous Fish Act, 79 Stat. 1125, 16 U. S. C. §§ 757a–757f (1964 ed., Supp. II), is on this aspect of the present case in *pari materia* with the 1920 Act. We know from § 1 of the 1965 Act that Congress is greatly concerned with the depletion of these fish resources "from water resources developments and other causes." See also H. R. Rep. No. 1007, 89th Cong., 1st Sess., pp. 2–5; S. Rep. No. 860, 89th Cong., 1st Sess.; Anadromous Fish, Hearings before the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries, 89th Cong., 1st Sess., 133; Anadromous Fish, Hearings before the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries, 88th Cong., 2d Sess., 11. The rapid depletion of the Nation's anadromous fish resources led Congress to enact the Anadromous Fish Act which authorizes federal-state cooperation for the conservation, development, and enhancement of the Nation's anadromous fish resources and to prevent their depletion from various causes including water resources development. In passing the Act, Congress was well aware that the responsibility for the destruction of the anadromous fish population partially lies with the "improvement" and "development" of water resources. It directed the Secretary of the Interior "to conduct such studies and make such recommendations as the Secretary determines to be appropriate regarding the development and management of any

[7] See H. R. Rep. No. 1007, 89th Cong., 1st Sess., pp. 2–5; S. Rep. No. 860, 89th Cong., 1st Sess.; Anadromous Fish, Hearings before the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries, 88th Cong., 2d Sess., 11.

stream or other body of water for the conservation and enhancement of anadromous fishery resources." § 2.

Mr. Justice Holmes once wrote that "A river is more than an amenity, it is a treasure." [8] *New Jersey* v. *New York*, 283 U. S. 336, 342. That dictum is relevant here for the Commission under § 10 of the 1920 Act, as amended, must take into consideration not only hydroelectric power, navigation, and flood control, but also the "recreational purposes" served by the river. And, as we have noted, the Secretary of the Interior has a mandate under the 1965 Act to study recommendations concerning water development programs for the purpose of the conservation of anadromous fish. Thus apart from § 7 (b) of the 1920 Act, as amended, the Secretary by reason of § 2 of the 1965 Act comes to the Federal Power Commission with a special mandate from Congress, a mandate that gives him

[8] Recently, Congress has expressed a renewed interest in preserving our Nation's rivers in their wild, unexploited state. On January 18, 1966, the Senate passed the National Wild Rivers bill (S. 1446, 89th Cong., 2d Sess., 112 Cong. Rec. 500 (daily ed., Jan. 18, 1966), and it was pending before the House of Representatives when the Eighty-ninth Congress adjourned. The bill has already been reintroduced in the Ninetieth Congress. S. 119, 90th Cong., 1st Sess.). If enacted, it would preserve the Salmon River, a tributary of the Snake just below High Mountain Sheep, in its natural state. The bill states:

"The Congress finds that some of the free-flowing rivers of the United States possess unique water conservation, scenic, fish, wildlife, and outdoor recreation values of present and potential benefit to the American people. The Congress also finds that our established national policy of dam and other construction at appropriate sections of the rivers of the United States needs to be complemented by a policy that would preserve other selected rivers or sections thereof in their free-flowing condition to protect the water quality of such rivers and to fulfill other vital national conservation purposes. It is the policy of Congress to preserve, develop, reclaim, and make accessible for the benefit of all of the American people selected parts of the Nation's diminishing resource of free-flowing rivers." And see §§ 2 and 4 (d) of the Wilderness Act of 1964, 78 Stat. 890, 894.

special standing to appear, to intervene, to introduce evidence on the proposed river development program, and to participate fully in the administrative proceedings.

Fishing is obviously one recreational use of the river and it also has vast commercial implications as the legislative history of the 1965 Act indicates. The Commission, to be sure, did not wholly neglect this phase of the problem. In its report it adverted to the anadromous fish problem, stating that it was "highly controversial" and was not "clearly resolved on record." The reservoir is "the most important hazard" both to upstream migrants and downstream migrants. Upstream migrants can be handled quite effectively by fish ladders. But those traveling downstream must go through the turbines; and their mortality is high. Moreover, Chinook salmon are "basically river fish and do not appear to adapt to the different conditions presented by a reservoir." 31 F. P. C., at 260. The ecology of a river is different from the ecology of a reservoir built behind a dam. What the full effect on salmon will be is not known. But we get a glimmering from the Commission's report. As to this the Commission said:

> "A reservoir exhibits a peculiar thermal structure. During the winter it is homogeneous with regard to temperature, but as the season advances a horizontal stratification results with the colder water sinking lower. Since Salmon River water is colder than Snake River water, it is possible, if not probable, that in the Nez Perce reservoir the water from the two rivers would be found in separate layers and be drawn off at different times. Presumably the upstream migrants reaching fish ladders might at one time be presented with water from one river and at another time water from the other river. If water quality is important in attracting the upstream migrants to their proper streams, as many experts

believe, this stratification would be a source of confusion and delay. Also a source of confusion to the upstream migrants would be the predicted tendency shown by the record for water from the Salmon River arm of the Nez Perce reservoir to flow up the Snake River arm and vice versa. Again the fish are faced with a complicated problem in finding their way.

"The velocity of flow in the Nez Perce or HMS reservoir would be very low compared with the free flowing stream or even compared to the flow in the reservoir of the McNary dam on the Columbia. Since the upstream migrants follow water flow and downstream migrants are carried by current, such low velocities offer a further obstacle to the passage of anadromous fish.

"The record also shows that during the summer months the oxygen content of the water in the reservoir at the lower levels will fall to amounts which are dangerously insufficient for salmon. The decrease in oxygen content appears to be due to decomposed sinking dead organisms (plankton) from the upper layers of water. The record indicates that salmon require an oxygen content of approximately five parts per million, yet the oxygen content at the 250–350 foot level would fall in August to less than three parts per million." 31 F. P. C., at 261.

The Commission further noted that some salmon remain in the reservoir due to "loss of water velocity or accumulation of dissolved salts" and are lost "as perpetuators of the species." But it did not have statistics showing the loss of the downstream migrants as a result of passing through the turbines. We are told from studies of the Bureau of Commercial Fisheries that the greatest downstream migration occurs at night when turbine loads

are lower.[9] We are told from these studies that the effect of dams on the downstream migration of salmon and steelhead may be disastrous.[10] It is reported that unless practical alternatives are designed, such as the collection of juvenile fish above the dams and their transportation below it, we may witness an inquest on a great industry and a great "recreational" asset of the Nation.

In his letter of November 21, 1960, the Secretary of the Interior noted the adverse effects this present project would have on anadromous fish, that the facilities proposed to protect the fish were "unproved," and that "conservation in the fullest sense calls for a deferral while full advantage is taken of the opportunity presented by Canadian storage and Libby [Dam]." The Commission admitted that "high dams and reservoirs present major obstacles to anadromous fish," that it was not optimistic "as to the efficacy of fish passage facilities on high

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[9] Long, Day-night Occurrence and Vertical Distribution of Juvenile Anadromous Fish in Turbine Intakes (U. S. Bureau of Commercial Fisheries, Fish-Passage Research Program) 12, 13, 16.

[10] From the data, it would appear that successful passage of juvenile salmonoids is highly unlikely through the impoundments that will be created in the Middle Snake River Basin. This implies that if natural runs are to be passed in this area, downstream migrants must be collected in the head of a reservoir or in streams above the reservoir and transported below.

"Passage of juveniles has not been successful. Escapement from the reservoir varied from year to year, ranging from approximately 10 to 55 percent of the calculated recruitment. The best passage occurred in 1964 in conjunction with a substantial drawdown, high inflows, and a slow spring fill-up that resulted in large discharges (up to 50,000 c. f. s.) during smolt migration. Progeny of spring-run chinook stocks appear to fare better than those from the fall run, and limited data on steelhead suggest that this species may be having even greater difficulty than salmon in passing through the reservoir." Collins & Elling, Summary of Progress in Fish-Passage Research 1964, p. 2, in Vol. 1, Fish-Passage Research Program, Review of Progress (U. S. Bureau of Commercial Fisheries 1964).

dams," and concluded with the forlorn statement that, "We can hope for the best and we will continue to insist that any licensee building a high dam at a site which presumably involves major fish runs do everything possible within the limits of reasonable expense to preserve the fish runs. But as of now we understandably must assume that the best efforts will be only partly successful and that real damage may and probably will be done to any such fish runs." 31 F. P. C., at 262.

Equally relevant is the effect of the project on wildlife. In his letter of November 21, 1960, the Secretary of the Interior noted that the areas of the proposed projects were important wildlife sanctuaries, inhabited by elk, deer, partridge, a variety of small game and used by ducks, geese, and mourning doves during migration. He concluded that "adverse effects of the proposed project [HMS] on wildlife could [not] be mitigated." Letter of November 21, 1960 (Joint App. 133), as corrected by letter of December 7, 1960 (J. A. 137). The Secretary concluded that "Several thousand acres of mule deer range would be inundated and there would be a moderate reduction in the number of deer as a result of loss of range. There would be losses of upland game, fur animals, and waterfowl. Reservoir margins would be barren and unattractive to all wildlife groups. Waterfowl use of the reservoir would be insignificant. There does not appear to be any feasible means of mitigating wildlife losses."

The Fish and Wildlife Coordination Act, 48 Stat. 401, as amended, 72 Stat. 563, 16 U. S. C. § 661 *et seq.*, establishes a national policy of "recognizing the vital contribution of our wildlife resources to the Nation, the increasing public interest and significance thereof due to expansion of our national economy and other factors, and to provide that wildlife conservation shall receive equal consideration and be co-ordinated with other features of water-resource development programs . . . ." Section 2 (a), 16 U. S. C. § 662 (a), provides that an agency evaluating a

license under which "the waters of any stream or other body of water are proposed . . . to be impounded" "first shall consult with the United States Fish and Wildlife Service, Department of the Interior . . . with a view to the conservation of wildlife resources by preventing loss of and damage to such resources . . . ." Certainly the wildlife conservation aspect of the project must be explored and evaluated.

These factors of the anadromous fish and of other wildlife may indeed be all-important in light of the alternate sources of energy that are emerging.

In his letter of November 21, 1960, the Secretary noted that, due to increased power resources, the projects could be safely deferred. "These projects could extend the time still further, as could also be the case in the event nuclear power materialized at Hanford in the 1960–1970 period. This possibility, as you know, has been under intensive study by your staff for the Atomic Energy Commission . . . ."

The urgency of the hydroelectric power at High Mountain Sheep was somewhat discounted by the Secretary in his petition to intervene:

> "Power needs of the Northwest do not require immediate construction of the High Mountain Sheep Project. One of the reasons which leads the Secretary to intervene now is that the Examiner's decision of October 10, 1962, was handed down just prior to Congressional action which substantially altered the federal power resource program of the Pacific Northwest. This Congressional action requires a complete re-examination and re-appraisement of the conclusions stated as the basis for the Examiner's findings.
>
> "The action of Congress in the session just concluded has made provisions for new federal power producing facilities. Bruc[e]s Eddy Dam, with a

peak capacity of 345,000 KW, was authorized and received an appropriation for the start of construction in Fiscal Year 1963. Asotin Dam, with a peak capacity of 331,000 KW, was also authorized. Little Goose Dam, with a peak capacity of 466,000 KW, which had previously been authorized, received an appropriation for the start of construction in 1963. Most important of all, generation at the Hanford Thermal Project, which would add approximately 905,000 kilowatts to the Northwest's power resources was also approved.

"There are other possibilities regarding new power sources which have reasonable prospects of realization. They include Canadian storage, realization of which is dependent upon consummation of the Canadian Treaty. Additional firm capacity which would accrue to the United States from such storage would be 1,300,000 kilowatts. In addition, the Treaty would allow the construction of Libby Dam which would initially have a capacity of 397,000 kilowatts. There is also the possibility of the availability in the United States of power from the Canadian entitlement under the Treaty of 1,300,000 kilowatts. Plans are also under way for construction of a 500,000 kilowatt steam plant by Kittitas PUD and Grant County PUD. A number of different agencies have proposed the construction of the Pacific Northwest-Southwest transmission intertie which, by electrical integration, would add an additional 400,000 kilowatts of firm capacity for the Pacific Northwest.

"The total power resource of the area is therefore predictably in excess of all foreseeable requirements thereon for the period through 1968–1969 and sufficient to meet all requirements until at least 1972–1973 and potentially for years beyond that date. The addition of High Mountain Sheep Dam will not

be needed until at least 1972–1973, and construction should be planned to bring it into production at that time or later as the developing power resource picture indicates.

"New generating facilities, which are not correlated to the power resources and power demands within the area of the marketing responsibility of BPA necessarily result in surpluses of power on the federal system which is the basic wholesale supplier of power in the area and thereby result in financial deficits on the federal marketing system. In view of the role of the Federal system as the base supplier for the area, this threatens the stability of the area's permanent resources and hence of the area's economy. The High Mountain Sheep project at this time would have such an effect."

We are also told that hydroelectric power promises to occupy a relatively small place in the world's supply of energy. It is estimated that when the world's population reaches 7,000,000,000—as it will in a few decades—the total energy requirement [11] will be 70,000,000,000 metric tons of coal or equivalent annually and that it will be supplied as follows:

Source	*Equivalent metric tons of coal (billions)*
Solar energy (for two-thirds of space heating)	15.6
Hydroelectricity	4.2
Wood for lumber and paper	2.7
Wood for conversion to liquid fuels and chemicals	2.3
Liquid fuels and "petro" chemicals produced via nuclear energy	10.0
Nuclear electricity	35.2
Total	70.0

Brown, The Next Hundred Years (1957), p. 113.

[11] Projections of energy sources for the coming years have been summarized in Energy R & D and National Progress, prepared for the Interdepartmental Energy Study by the Energy Study

By 1980 nuclear energy "should represent a significant proportion of world power production." *Id.*, at 109. By the end of the century "nuclear energy may account for about one-third of our total energy consumption." *Ibid.* "By the middle of the next century it seems likely that most of our energy needs will be satisfied by nuclear energy." *Id.*, at 110.

Group, Under Direction of A. B. Cambel, at 22. The following table is taken from that source.

Percent of total energy requirements supplied by hydro, nuclear, and fossil fuels

Source and publication date	1975			1980			2000		
	Hydro	Nuclear	Fossil	Hydro	Nuclear	Fossil	Hydro	Nuclear	Fossil
Paley (1952)	4.6	----	95.4	----	----	----	----	----	----
Schurr and Netschert (1960)	3.2	(1)	196.8	----	----	----	----	----	----
Interior-McKinney (1956)[2]	2.7	2.7	94.6	----	----	----	----	----	----
Teitelbaum (1958)	----	----	----	3.0	8.7	88.3	----	----	----
Lamb (1959)	----	----	----	2.6	4.0	93.4	----	----	----
Texas Eastern Transmission Corp. (1961)[3]	----	----	----	2.4	1.4	96.2	----	----	----
Lasky Study Group (1962)[4]	----	----	----	2.5	2.5	95.0	----	----	----
Sporn (1959)	2.9	1.8	95.3	----	----	----	2.3	21.3	76.4
Searl (1960)[5]	----	----	----	3.0	97.0		1.5	98.5	
Atomic Energy Commission (1962)[6]	----	----	----	3.0	3.0	94.0	1.7	23.3	75.0
Landsberg, Fischman and Fisher (1963)	----	----	----	3.4	4.7	91.9	2.1	14.0	83.9

[1] Estimates were made in terms of conventional sources, but text indicates that 2.5 to 3.75 percent of the total might come from atomic fuels.

[2] Although this forecast goes to 1980, the values for that year are shown only in graphic form. Therefore, the 1975 values which are given in a table are used here.

[3] Calculations based on figures after adjusting hydropower to fuel input basis.

[4] Concerning nuclear power, the report adds "* * * but there should be no surprise if nuclear power should insinuate itself into the energy economy of the country at a much faster rate."

[5] Nuclear power included with coal.

[6] Nuclear use is for electricity generation.

NOTE:

a. Actuals for 1960 according to the U.S. Bureau of Mines: Hydropower, 3.9 percent; nuclear, 0.1 percent; and fossil fuels, 96.0 percent.

b. Hydropower is on a fuel equivalent basis.

c. Week's estimates show a breakdown by fuel types but are presented in a cumulative form which makes estimation of annual values difficult.

Some of these time schedules are within the period of the 50-year licenses granted by the Commission.

Nuclear energy is coming to the Columbia River basin by 1975. For plans are afoot to build a plant on the Trogan site, 14 miles north of St. Helens. This one plant will have a capacity of 1,000,000 kws. This emphasizes the relevancy of the Secretary's reference to production and distribution of nuclear energy at the Hanford Thermal Project which he called "most important of all" and which Congress has authorized. 76 Stat. 604.

Implicit in the reasoning of the Commission and the Examiner is the assumption that this project must be built and that it must be built now. In the view of the Commission, one of the factors militating against federal development was that "[t]he Department of Interior . . . frankly admitted it [had] no present intention of seeking authorization to commence construction or planning to construct an HMS project." 31 F. P. C., at 277. The Examiner's report stated that "[a] comprehensive plan provides for *prompt* and optimum multipurpose development of the water resource" and that the relative merits of the proposed projects "turn on a comparison of the costs and benefits of component developments and on which project is best adapted to attain optimum development *at the earliest time* with the smallest sacrifice of natural values." J. A. 394 (emphasis added). But neither the Examiner nor the Commission specifically found that deferral of the project would not be in the public interest or that immediate development would be more in the public interest than construction at some future time or no construction at all. Section 4 (e) of the Act, the section authorizing the Commission to grant licenses, provides in part:

> "Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified

> in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission." 49 Stat. 840, 16 U. S. C. § 797 (e).

And § 10 (a) of the Act provides that:

> "the project adopted . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes . . . ." 49 Stat. 842, 16 U. S. C. § 803 (a).

The issues of whether deferral of construction would be more in the public interest than immediate construction and whether preservation of the reaches of the river affected would be more desirable and in the public interest than the proposed development are largely unexplored in this record. We cannot assume that the Act commands the immediate construction of as many projects as possible. The Commission did discuss the Secretary of Interior's claim that, due to alternate power sources, the region will not need the power supplied by the High Mountain Sheep dam for some time. And it concluded that "[o]f more significance . . . than the regional power situation are the load and resources of the [Pacific Northwest Power Company] companies themselves," which could use the power in the near future. 31 F. P. C., at 272. It added, "In summary as to the need for power, we conclude that the PNPC sponsoring companies will be able to use HMS power as soon as it is available." 31 F. P. C., at 273. On rehearing, the Commission stated that "HMS power will be needed on a regional basis by 1970–1971 . . . ." 31 F. P. C. 1051, 1052.

The question whether the proponents of a project "will be able to use" the power supplied is relevant to the issue of the public interest. So too is the regional need for the additional power. But the inquiry should not stop there. A license under the Act empowers the licensee to construct, for its own use and benefit, hydroelectric projects utilizing the flow of navigable waters and thus, in effect, to appropriate water resources from the public domain. The grant of authority to the Commission to alienate federal water resources does not, of course, turn simply on whether the project will be beneficial to the licensee. Nor is the test solely whether the region will be able to use the additional power. The test is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to the "public interest," including future power demand and supply, alternate sources of power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife.

The need to destroy the river as a waterway, the desirability of its demise, the choices available to satisfy future demands for energy—these are all relevant to a decision under § 7 and § 10 but they were largely untouched by the Commission.

On our remand there should be an exploration of these neglected phases of the cases, as well as the other points raised by the Secretary.

We express no opinion on the merits. It is not our task to determine whether any dam at all should be built or whether if one is authorized it should be private or public. If the ultimate ruling under § 7 (b) is that the decision concerning the High Mountain Sheep site should be made by the Congress, the factors we have mentioned will be among the many considerations it doubtless will appraise. If the ultimate decision under § 7 (b) is the

other way, the Commission will not have discharged its functions under the Act unless it makes an informed judgment on these phases of the cases.

This leaves us with the questions presented by Washington Public Power Supply System in No. 462. The main points raised by it are that it is a "municipality" within the meaning of § 7 (a) and therefore entitled to a preference over this power site, that the Commission violated that statutory preference, and that while Pacific Northwest had a prior preliminary permit granted under § 5 of the Act, the Commission unlawfully expanded it to include this site. We express no opinion on the merits of these contentions because they may or may not survive a remand. If in time the project, if any, becomes a federal one, Washington Public Power Supply System would be excluded along with Pacific Northwest, and the points now raised by it would become moot. If in time a new license is issued to Pacific Northwest, the points now raised by Washington Public Power Supply System can be preserved. Accordingly in No. 462 we vacate the judgment and remand the case to the Court of Appeals with instructions to remand to the Commission. In No. 463 we reverse the judgment and remand the case to the Court of Appeals with instructions to remand to the Commission. Each remand is for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE FORTAS took no part in the consideration or decision of these cases.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

I had thought it indisputable, first, that a court may not overturn a determination made by an administrative agency upon a question committed to the agency's judg-

ment unless the determination is "unsupported by substantial evidence," [1] and, second, that the substantiality of the evidence must be measured through, and only after, an examination of the "whole record." [2]

The Commission has determined, on the basis of 14,327 pages of testimony and exhibits, of "extensive material" [3] submitted after the close of the record by the Secretary of the Interior,[4] and of the Commission's own "general

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[1] Administrative Procedure Act § 10 (e), 5 U. S. C. § 706 (2) (E) (1964 ed., Supp. II). See also *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, 488; Jaffe, Judicial Control of Administrative Action 600 *et seq.* (1965).

[2] 5 U. S. C. § 706 (1964 ed., Supp. II).

[3] 31 F. P. C. 247, 275.

[4] The history of the Secretary's extraordinary series of belated and apparently indecisive interventions in these proceedings warrants a more complete chronicle than the Court has given. On March 31, 1958, Pacific Northwest applied for a license for the High Mountain Sheep site, and on October 21, 1959, the Commission solicited the views of the Secretary of the Interior. On November 21, 1960, the Secretary replied substantively, and urged that the entire project be postponed, since the available power supply in the region was, in his view, then sufficient. The hearings nonetheless continued. On March 15, 1961, the Secretary wrote once more, first to indicate that he was withdrawing permission for Interior Department employees to testify at the hearings on questions of the alternative power sources and of the protection of the anadromous fish, and second to suggest that the hearings should be recessed or suspended until the end of 1964, more than three years later. There was, in these various communications, no intimation that federal development of the site was desirable or even appropriate. The hearings concluded on September 12, 1961.

On June 28, 1962, the Secretary suggested, for the first time, that federal development might be suitable; he did not, however, urge that either he or the Commission should immediately seek congressional approval of such a federal project, a precondition to its commencement. Nor did the Secretary intimate that the evidentiary record that had been compiled by the Commission might be incomplete, or request that it be reopened so that he might supple-

knowledge of the Columbia River System," 31 F. P. C. 247, 277, that the application of Pacific Northwest was "best adapted to a comprehensive plan," 49 Stat. 842, 16 U. S. C. § 803 (a), of development for this portion of the Columbia River Basin, and that, as a consequence, this site should not now be reserved for later development by the United States.[5]

The Court of Appeals unanimously concluded that this evidentiary record establishes that "the Commission was amply justified in refusing to recommend federal development and in issuing a license for private con-

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ment it. Nonetheless, the Commission *sua sponte* ordered the parties to respond to the Secretary's suggestion.

On October 8, 1962, the Examiner completed his recommendations, concluding that Pacific Northwest's proposal was "best adapted" to the river's development, in part because federal development could not reasonably be immediately anticipated. The Secretary thereupon sought to intervene out of time, and to file exceptions. He did not request that the record be reopened. His motions were granted, and very extensive exceptions were filed. Oral argument of the exceptions was subsequently heard. Neither in the exceptions nor, apparently, in the oral argument did the Secretary seek to reopen the record to supplement the evidence before the Commission.

The Commission's decision, rejecting the Secretary's suggestions, was announced on February 5, 1964. The Secretary sought a rehearing on March 26, 1964, and only then did he ask that the record be reopened. He offered only the most general indications of the evidence he would introduce if his motion were granted. Not surprisingly, the Commission denied the motion, and, after consideration of various "pleadings," affirmed, with certain minor modifications, its first order. 31 F. P. C. 1051. These actions for review followed. The Secretary, apparently for the first time, announced in his petition to this Court for a writ of certiorari that he was now prepared to seek immediate congressional approval for federal construction of a dam at High Mountain Sheep.

[5] Section 7 (b) of the Federal Power Act, 49 Stat. 842, 16 U. S. C. § 800 (b), requires the Commission to refuse any application when it concludes that the project should be undertaken by the United States.

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struction." 123 U. S. App. D. C. 209, 217, 358 F. 2d 840, 848. I agree. Doubtless much of the evidence was not, as it was submitted, labeled as pertinent to a determination of the Commission's responsibilities under § 7 (b), but I had not before understood that evidence marshaled in support of an agency's finding must, if it is to be credited, have been tidily categorized at the hearing according to the purposes for which it might subsequently be employed.

I can only conclude that the Court, despite its self-serving disclaimer, *ante*, pp. 450–451, has, in its haste to give force to its own findings of fact on the breeding requirements of anadromous fish [6] and on the likelihood that solar and nuclear power will shortly be alternative sources of supply, substituted its own preferences for the discretion given by Congress to the Federal Power Commission. In particular, it must be emphasized that the Court, alone among the Secretary of the Interior, the Commission, Pacific Northwest, the Washington Public Power Supply System, and the various other intervenors, apparently supposes that no dam at all may now be

[6] It must be noted that nothing in the terms, purposes, or legislative history of the Anadromous Fish Act of 1965, 79 Stat. 1125, suggests in any way that it was expected to provide the Secretary or this Court with any retroactive "mandate" to overturn the Commission's judgment. The only pertinent portions of the legislative history are plain and uncontradicted acknowledgments from the Federal Power Commission that the Act would not "have any effect" on its authority. Anadromous Fish, Hearings before the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries, 88th Cong., 2d Sess., 45; H. R. Rep. No. 1007, 89th Cong., 1st Sess., 21. Ironically, the Commission twice during the course of those hearings called attention, without any rejoinder from the Secretary, to the High Mountain Sheep project as an illustration of its continuing and earnest concern for the protection of anadromous fish. Hearings, *supra*, at 45; Report, *supra*, at 22.

needed at High Mountain Sheep.[7] Wherever the right lies on that issue, it need only be said that Congress has entrusted its resolution to the Commission's informed discretion, and that, on the basis of an ample evidentiary record, the Commission has determined that Pacific Northwest should now be licensed to construct the project.

I would affirm the judgments in both cases substantially for the reasons given in Judge Miller's opinion below, as amplified by the considerations contained in this opinion.

[7] Contrary to his earlier position, *supra*, p. 452, the Secretary, as has been noted, now apparently entertains no doubt that the project should be immediately commenced.

COMMISSIONER OF INTERNAL REVENUE *v.* ESTATE OF BOSCH.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 673. Argued March 22, 1967.—Decided June 5, 1967.*

Where federal estate tax liability turns upon the character of a property interest held and transferred by the decedent under state law, *held*, federal authorities are not bound by the determination made of such property interest by a state trial court; if there is no decision by the State's highest court federal authorities must apply what they find to be the state law after giving "proper regard" to relevant rulings of other courts of the State. Pp. 457, 462–466.

No. 673, 363 F. 2d 1009, reversed and remanded; No. 240, 351 F. 2d 489, affirmed.

Jack S. Levin argued the cause for petitioner in No. 673 and for the United States in No. 240. With him on the briefs were *Acting Solicitor General Spritzer, Assistant Attorney General Rogovin, Richard C. Pugh, Meyer Rothwacks, Robert N. Anderson* and *Thomas Silk, Jr.*

Curtiss K. Thompson argued the cause for petitioner in No. 240. With him on the briefs was *John H. Weir.*

John W. Burke, Jr., argued the cause and filed a brief for respondent in No. 673.

MR. JUSTICE CLARK delivered the opinion of the Court.

These two federal estate tax cases present a common issue for our determination: Whether a federal court or agency in a federal estate tax controversy is conclusively bound by a state trial court adjudication of property

*Together with No. 240, *Second National Bank of New Haven, Executor* v. *United States*, also on certiorari to the same court.

rights or characterization of property interests when the United States is not made a party to such proceeding.

In No. 673, *Commissioner of Internal Revenue* v. *Estate of Bosch*, 363 F. 2d 1009, the Court of Appeals for the Second Circuit held that since the state trial court had "authoritatively determined" the rights of the parties, it was not required to delve into the correctness of that state court decree. In No. 240, *Second National Bank of New Haven, Executor* v. *United States*, 351 F. 2d 489, another panel of the same Circuit held that the "decrees of the Connecticut Probate Court . . . under no circumstances can be construed as binding" on a federal court in subsequent litigation involving federal revenue laws. Whether these cases conflict in principle or not, which is disputed here, there does exist a widespread conflict among the circuits[1] over the question and we granted certiorari to resolve it. 385 U. S. 966, 968. We hold that where the federal estate tax liability turns upon the character of a property interest held and transferred by the decedent under state law, federal authorities are not bound by the determination made of such property interest by a state trial court.

I.

(a) No. 673, *Commissioner* v. *Estate of Bosch.*

In 1930, decedent, a resident of New York, created a revocable trust which, as amended in 1931, provided that the income from the corpus was to be paid to his wife during her lifetime. The instrument also gave her a general power of appointment, in default of which it provided that half of the corpus was to go to his heirs and the remaining half was to go to those of his wife.

[1] Illustrative of the conflict among the circuits are: *Gallagher* v. *Smith*, 223 F. 2d 218 (C. A. 3d Cir., 1955); *Faulkerson's Estate* v. *United States*, 301 F. 2d 231 (C. A. 7th Cir.), cert. denied, 371 U. S. 887 (1962); *Pierpont* v. *C. I. R.*, 336 F. 2d 277 (C. A. 4th Cir., 1964), cert. denied, 380 U. S. 908 (1965).

In 1951 the wife executed an instrument purporting to release the general power of appointment and convert it into a special power. Upon decedent's death in 1957, respondent, in paying federal estate taxes, claimed a marital deduction for the value of the widow's trust. The Commissioner determined, however, that the trust corpus did not qualify for the deduction under § 2056 (b)(5)[2] of the 1954 Internal Revenue Code and levied a deficiency. Respondent then filed a petition for redetermination in the Tax Court. The ultimate outcome of the controversy hinged on whether the release executed by Mrs. Bosch in 1951 was invalid—as she claimed it to be—in which case she would have enjoyed a general power of appointment at her husband's death and the trust would therefore qualify for the marital deduction. While the Tax Court proceeding was pending, the respondent filed a petition in the Supreme Court

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[2] Section 2056 (b)(5) of the Internal Revenue Code of 1954, 26 U. S. C. § 2056 (b)(5), provides:

"(5) *Life estate with power of appointment in surviving spouse.*—In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, . . . with power in the surviving spouse to appoint the entire interest, . . . (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—

"(A) the interest . . . thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and

"(B) no part of the interest so passing shall, for purposes of paragraph (1)(A), be considered as passing to any person other than the surviving spouse.

"This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events."

of New York for settlement of the trustee's account; it also sought a determination as to the validity of the release under state law. The Tax Court, with the Commissioner's consent, abstained from making its decision pending the outcome of the state court action. The state court found the release to be a nullity; the Tax Court then accepted the state court judgment as being an "authoritative exposition of New York law and adjudication of the property rights involved," 43 T. C. 120, 124, and permitted the deduction. On appeal, a divided Court of Appeals affirmed. It held that "[t]he issue is . . . not whether the federal court is 'bound by' the decision of the state tribunal, but whether or not a state tribunal has authoritatively determined the rights under state law of a party to the federal action." 363 F. 2d, at 1013. The court concluded that the "New York judgment, rendered by a court which had jurisdiction over parties and subject matter, authoritatively settled the rights of the parties, not only for New York, but also for purposes of the application to those rights of the relevant provisions of federal tax law." *Id.*, at 1014. It declared that since the state court had held the wife to have a general power of appointment under its law, the corpus of the trust qualified for the marital deduction. We do not agree and reverse.

(b) No. 240, *Second National Bank of New Haven, Executor* v. *United States.*

Petitioner in this case is the executor of the will of one Brewster, a resident of Connecticut who died in September of 1958. The decedent's will, together with a codicil thereto, was admitted to probate by the Probate Court for the District of Hamden, Connecticut. The will was executed in 1958 and directed the payment "out of my estate my just debts and funeral expenses and any death taxes which may be legally assessed . . . ." It further

directed that the "provisions of any statute requiring the apportionment or proration of such taxes among the beneficiaries of this will or the transferees of such property, or the ultimate payment of such taxes by them, shall be without effect in the settlement of my estate." The will also provided for certain bequests and left the residue in trust; one-third of the income from such trust was to be given to decedent's wife for life, and the other two-thirds for the benefit of his grandchildren that were living at the time of his death. In July of 1958, the decedent executed a codicil to his will, the pertinent part of which gave his wife a general testamentary power of appointment over the corpus of the trust provided for her. This qualified it for the marital deduction as provided by the Internal Revenue Code of 1954, § 2056 (b)(5). In the federal estate tax return filed in 1959, the widow's trust was claimed as part of the marital deduction and that was computed as one-third of the residue of the estate before the payment of federal estate taxes. It was then deducted, along with other deductions not involved here, from the total value of the estate and the estate tax was then computed on the basis of the balance. The Commissioner disallowed the claimed deduction and levied a deficiency which was based on the denial of the widow's allowance as part of the marital deduction and the reduction of the marital deduction for the widow's trust, by requiring that the estate tax be charged to the full estate prior to the deduction of the widow's trust. After receipt of the deficiency notice, the petitioner filed an application in the state probate court to determine, under state law, the proration of the federal estate taxes paid. Notice of such proceeding was given all interested parties and the District Director of Internal Revenue. The guardian *ad litem* for the minor grandchildren filed a verified report

stating that there was no legal objection to the proration of the federal estate tax as set out in the application of the executor. Neither the adult grandchildren nor the District Director of Internal Revenue filed or appeared in the Probate Court. The court then approved the application, found that the decedent's will did not negate the application of the state proration statute and ordered that the entire federal tax be prorated and charged against the grandchildren's trusts. This interpretation allowed the widow a marital deduction of some $3,600,000 clear of all federal estate tax. The Commissioner, however, subsequently concluded that the ruling of the Probate Court was erroneous and not binding on him, and he assessed a deficiency. After payment of the deficiency, petitioner brought this suit in the United States District Court for a refund. On petitioner's motion for summary judgment, the Government claimed that there was a genuine issue of material fact, *i. e.*, whether the probate proceedings had been adversary in nature. The District Court held that the "decrees of the Connecticut Probate Court . . . under no circumstances can be construed as binding and conclusive upon a federal court in construing and applying the federal revenue laws." 222 F. Supp. 446, 457. The court went on to hold that under the standard applied by the state courts, there was no "clear and unambiguous direction against proration," and that therefore the state proration statute applied. *Id.*, at 454. The Court of Appeals reversed, holding that the decedent's will "would seem to be clear and unambiguous to the effect that taxes were to come out of his residual estate and that despite any contrary statute the testator specifically wished to avoid any proration." 351 F. 2d, at 491. It agreed with the District Court that, in any event, the judgment of the State Probate Court was not binding on the federal court.

II.

Petitioner in No. 240 raises the additional point that the Court of Appeals was incorrect in holding that decedent's will clearly negated the application of the state proration statute. While we did not limit the grant of certiorari, we affirm without discussion the holding of the Court of Appeals on the point. The issue presents solely a question of state law and "[w]e ordinarily accept the determination of local law by the Court of Appeals . . . and we will not disturb it here." *Ragan* v. *Merchants Transfer Co.*, 337 U. S. 530, 534 (1949); *General Box Co.* v. *United States*, 351 U. S. 159, 165 (1956); *The Tungus* v. *Skovgaard*, 358 U. S. 588, 596 (1959). The Court of Appeals did not pass on the correctness of the resolution of the state law problem involved in *Bosch*, No. 673, and it is remanded for that purpose.

III.

The problem of what effect must be given a state trial court decree where the matter decided there is determinative of federal estate tax consequences has long burdened the Bar and the courts. This Court has not addressed itself to the problem for nearly a third of a century.[3] In *Freuler* v. *Helvering*, 291 U. S. 35 (1934), this Court, declining to find collusion between the parties on the record as presented there, held that a prior *in personam* judgment in the state court to which the United States was not made a party, "[o]bviously . . . had not the effect of *res judicata*, and could not furnish

[3] It may be claimed that *Blair* v. *Commissioner*, 300 U. S. 5 (1937), dealt with the problem presently before us but that case involved the question of the effect of a property right determination by a state appellate court.

the basis for invocation of the full faith and credit clause . . . ." At 43. In *Freuler's* wake, at least three positions have emerged among the circuits. The first of these holds that

> ". . . if the question at issue is fairly presented to the state court for its independent decision and is so decided by the court the resulting judgment if binding upon the parties under the state law is conclusive as to their property rights in the federal tax case . . . ." *Gallagher* v. *Smith*, 223 F. 2d 218, 225.

The opposite view is expressed in *Faulkerson's Estate* v. *United States*, 301 F. 2d 231. This view seems to approach that of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), in that the federal court will consider itself bound by the state court decree only after independent examination of the state law as determined by the highest court of the State. The Government urges that an intermediate position be adopted; it suggests that a state trial court adjudication is binding in such cases only when the judgment is the result of an adversary proceeding in the state court. *Pierpont* v. *C. I. R.*, 336 F. 2d 277. Also see the dissent of Friendly, J., in *Bosch*, No. 673.

We look at the problem differently. First, the Commissioner was not made a party to either of the state proceedings here and neither had the effect of *res judicata*, *Freuler* v. *Helvering, supra;* nor did the principle of collateral estoppel apply. It can hardly be denied that both state proceedings were brought for the purpose of directly affecting federal estate tax liability. Next, it must be remembered that it was a federal taxing statute that the Congress enacted and upon which we are here passing. Therefore, in construing it, we must look to the legislative history surrounding it. We find that the

report of the Senate Finance Committee recommending enactment of the marital deduction used very guarded language in referring to the very question involved here. It said that "proper regard," not finality, "should be given to interpretations of the will" by state courts and then only when entered by a court "in a bona fide adversary proceeding." S. Rep. No. 1013, Pt. 2, 80th Cong., 2d Sess., 4. We cannot say that the authors of this directive intended that the decrees of state trial courts were to be conclusive and binding on the computation of the federal estate tax as levied by the Congress. If the Congress had intended state trial court determinations to have that effect on the federal actions, it certainly would have said so—which it did not do. On the contrary, we believe it intended the marital deduction to be strictly construed and applied. Not only did it indicate that only "proper regard" was to be accorded state decrees but it placed specific limitations on the allowance of the deduction as set out in §§ 2056 (b), (c), and (d). These restrictive limitations clearly indicate the great care that Congress exercised in the drawing of the Act and indicate also a definite concern with the elimination of loopholes and escape hatches that might jeopardize the federal revenue. This also is in keeping with the long-established policy of the Congress, as expressed in the Rules of Decision Act, 28 U. S. C. § 1652. There it is provided that in the absence of federal requirements such as the Constitution or Acts of Congress, the "laws of the several states . . . shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." This Court has held that judicial decisions are "laws of the . . . state" within the section. *Erie R. Co.* v. *Tompkins, supra; Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541 (1949); *King* v. *Order of Travelers*, 333 U. S. 153 (1948).

Moreover, even in diversity cases this Court has further held that while the decrees of "lower state courts" should be "attributed some weight . . . the decision [is] not controlling . . ." where the highest court of the State has not spoken on the point. *King* v. *Order of Travelers, supra,* at 160–161. And in *West* v. *A. T. & T. Co.,* 311 U. S. 223 (1940), this Court further held that "an intermediate appellate state court . . . is a datum for ascertaining state law which is not to be disregarded by a federal court *unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.*" At 237. (Emphasis supplied.) Thus, under some conditions, federal authority may not be bound even by an intermediate state appellate court ruling. It follows here then, that when the application of a federal statute is involved, the decision of a state trial court as to an underlying issue of state law should *a fortiori* not be controlling. This is but an application of the rule of *Erie R. Co.* v. *Tompkins, supra,* where state law as announced by the highest court of the State is to be followed. This is not a diversity case but the same principle may be applied for the same reasons, *viz.,* the underlying substantive rule involved is based on state law and the State's highest court is the best authority on its own law. If there be no decision by that court then federal authorities must apply what they find to be the state law after giving "proper regard" to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court. *Bernhardt* v. *Polygraphic Co.,* 350 U. S. 198 (1956).

We believe that this would avoid much of the uncertainty that would result from the "non-adversary" approach and at the same time would be fair to the taxpayer and protect the federal revenue as well.

The judgment in No. 240 is therefore affirmed while that in No. 673 is reversed and remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS, dissenting.

As the Court says, the issue in these cases is not whether the Commissioner is "bound" by the state court decrees. He was not a party to the state court proceedings and therefore cannot be bound in the sense of *res judicata*. The question simply is whether, absent fraud or collusion, a federal court can ignore a state court judgment when federal taxation depends upon property rights and when property rights rest on state law, as they do here.

Since our 1938 decision in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, an unbroken line of cases has held that the federal courts must look to state legislation, state decisions, state administrative practice, for the state law that is to be applied. See, *e. g., Cities Service Oil Co.* v. *Dunlap*, 308 U. S. 208; *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198. Those were diversity cases; and in them we have never suggested that the federal court may ignore a relevant state court decision because it was not entered by the highest state court. Indeed, we have held that the federal court is obligated to follow the decision of a lower state court in the absence of decisions of the State Supreme Court showing that the state law is other than announced by the lower court. See, *e. g., Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169; *West* v. *A. T. & T. Co.*, 311 U. S. 223; *Six Companies of California* v. *Joint Highway District*, 311 U. S. 180; *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464.

It is true that in *King* v. *Order of Travelers*, 333 U. S. 153, we held that a federal court of appeals did not have

to accept the decision of a state court of common pleas on a matter of state law. But that case was unique. The state court had relied upon the decision of a federal district court; the "Court of Common Pleas [did] not appear to have such importance and competence within [the State's] own judicial system that its decisions should be taken as authoritative expositions of that State's 'law' " (*id.*, at 161); "the difficulty of locating Common Pleas decisions [was] a matter of great practical significance" (*ibid.*); another state court had handed down an opinion rejecting the reasoning of the court of common pleas and espousing the reasoning of the Court of Appeals, illustrating "the perils of interpreting a Common Pleas decision as a definitive expression of [state law]" (333 U. S., at 162); and the interpretation of the Court of Appeals, which rejected the decision of the court of common pleas, was strongly supported by the decisions of the State Supreme Court. We stressed that our decision was not "to be taken as promulgating a general rule that federal courts need never abide by determinations of state law by state trial courts." *Ibid.*

Even before it was held that federal courts must apply state law in diversity cases, it was incumbent upon federal courts to take state law from state court decisions when federal tax consequences turned on state law. In *Freuler* v. *Helvering*, 291 U. S. 35, the trustee under a decedent's will had included in income distributed to the life beneficiaries amounts representing depreciation of the corpus. The life beneficiaries did not include the amounts constituting depreciation and the Commissioner asserted a deficiency. While the case was on appeal to the Board of Tax Appeals, the trustee filed an accounting in the state probate court, requesting its approval. The state court held that the life beneficiaries were not entitled to the distribution of depreciation of the corpus, and

ordered that the life beneficiaries repay the trustee for the amount improperly distributed to them. In the tax litigation, the Court of Appeals ignored the state court determination on the ground that "no orders of the probate court, the effect of which would relate to what are deductions to be allowed under the national income taxing law, are conclusive and binding on the federal courts . . . ." 62 F. 2d 733, 735. The Court reversed, holding that the probate court order was an order governing distribution within § 219 of the Revenue Act of 1921. It went on to say:

> "Moreover, the decision of [the probate] court, until reversed or overruled, establishes the law of California respecting distribution of the trust estate. It is none the less a declaration of the law of the State because not based on a statute, or earlier decisions. The rights of the beneficiaries are property rights and the court has adjudicated them. What the law as announced by that court adjudges distributable is, we think, to be so considered in applying § 219 of the Act of 1921." 291 U. S., at 45.

The issue of the effect of a state court determination came up again in *Blair* v. *Commissioner*, 300 U. S. 5. The issue in that case was whether a beneficiary had effectively assigned income from a trust. In prior tax litigation, a federal court held that the trust was a spendthrift trust and that, therefore, the assignments were invalid and the income taxable to the beneficiary. The trustees then brought an action in the state court; the state courts determined that the trust was not a spendthrift trust and that the assignments were valid. The Board of Tax Appeals accepted the decision of the state court and rejected the Commissioner's claim that petitioner was liable for tax on the income. The Court

rejected the Commissioner's argument that the trust was a spendthrift trust, noting that:

> "The question of the validity of the assignments is a question of local law. . . . By that law the character of the trust, the nature and extent of the interest of the beneficiary, and the power of the beneficiary to assign that interest in whole or in part, are to be determined. The decision of the state court upon these questions is final. . . . It matters not that the decision was by an intermediate appellate court. . . . In this instance, it is not necessary to go beyond the obvious point that the decision was in a suit between the trustees and the beneficiary and his assignees, and the decree which was entered in pursuance of the decision determined as between these parties the validity of the particular assignments. Nor is there any basis for a charge that the suit was collusive and the decree inoperative. . . . The trustees were entitled to seek the instructions of the court having supervision of the trust. That court entertained the suit and the appellate court, with the first decision of the Circuit Court of Appeals before it, reviewed the decisions of the Supreme Court of the State and reached a deliberate conclusion. To derogate from the authority of that conclusion and of the decree it commanded, so far as the question is one of state law, would be wholly unwarranted in the exercise of federal jurisdiction.
>
> "In the face of this ruling of the state court it is not open to the Government to argue that the trust 'was, under the [state] law, a spendthrift trust.' The point of the argument is that, the trust being of that character, the state law barred the

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voluntary alienation by the beneficiary of his interest. The state court held precisely the contrary." *Id.*, 9–10.

I would adhere to *Freuler* v. *Helvering, supra,* and *Blair* v. *Commissioner, supra.* There was no indication in those cases that the state court decision would not be followed if it was not from the highest state court.

The idea that these state proceedings are not to be respected reflects the premise that such proceedings are brought solely to avoid federal taxes. But there are some instances in which an adversary proceeding is impossible (see, *e. g., Estate of Darlington* v. *Commissioner,* 302 F. 2d 693; Braverman & Gerson, The Conclusiveness of State Court Decrees in Federal Tax Litigation, 17 Tax L. Rev. 545, 570–572 (1962)), and many instances in which the parties desire a determination of their rights for other than tax reasons.

Not giving effect to a state court determination may be unfair to the taxpayer and is contrary to the congressional purpose of making federal tax consequences depend upon rights under state law. The result will be to tax the taxpayer or his estate for benefits which he does not have under state law. This aspect is emphasized in *Blair* v. *Commissioner, supra,* where the Government attempted to tax the taxpayer for income to which he had no right under state law. In *Second National Bank* v. *United States,* the grandchildren's trusts will be assessed for the estate taxes, since the state court held that the proration statute applied; but the estate tax will be computed as if the proration statute did not apply—the marital deduction will be decreased and the tax increased. Or take the case where a state court determines that X does not own a house. After X dies, a federal court determines that the state court was wrong and that X owned the house, and it

must be included in his gross estate even though it does not pass to his heirs. I cannot believe that Congress intended such unjust results.

This is not to say that a federal court is bound by all state court decrees. A federal court might not be bound by a consent decree, for it does not purport to be a declaration of state law; it may be merely a judicial stamp placed upon the parties' contractual settlement. Nor need the federal court defer to a state court decree which has been obtained by fraud or collusion. But where, absent those considerations, a state court has reached a deliberate conclusion, where it has construed state law, the federal court should consider the decision to be an exposition of the controlling state law and give it effect as such.

MR. JUSTICE HARLAN, whom MR. JUSTICE FORTAS joins, dissenting.

The central issue presented by these two cases is whether and in what circumstances a judgment of a lower state court is entitled to conclusiveness in a subsequent federal proceeding, if the state judgment establishes property rights from which stem federal tax consequences. The issue is doubly important: it is a difficult and intensely practical problem, and it involves basic questions of the proper relationship in this context between the state and federal judicial systems. For reasons which follow, I am constrained to dissent from the resolution reached by the Court in both cases.

I.

It is useful first to summarize the legal and factual circumstances out of which these cases arose.

In No. 240, *Second National Bank*, the decedent's will and codicil provided that one-third of the residuary estate should be held in trust for the decedent's widow,

who was given a general testamentary power of appointment over the corpus, and that the balance should be held in separate trusts for his nine grandchildren. The widow's trust was plainly within the terms of the marital deduction provided by § 2056 (b)(5) of the Internal Revenue Code of 1954; the issue in this instance thus simply involves determination of the amount of this trust, and hence the amount of the marital deduction. Under Connecticut's tax-proration statute, Conn. Gen. Stat. Rev. § 12–401, a bequest exempt from estate tax, as here by reason of the federal marital deduction, is not reduced by any portion of such tax. Accordingly, if the proration statute is applicable to this decedent's will, the widow's trust would bear no part of the federal estate tax, and its entire burden would instead fall upon the grandchildren's trusts. The amount of the marital deduction would be correspondingly increased.

By its terms, the state proration statute is to be applied unless the "testator otherwise directs." Article I of the decedent's will provided, without apparent ambiguity, that the "provisions of any statute requiring the apportionment or proration of [estate] taxes . . . shall be without effect in the settlement of my estate." Nonetheless, the executor, petitioner here, contended to the Commissioner that the statute was applicable, and, upon receipt of the 30-day deficiency letter,[1] applied to the Probate Court for the District of Hamden, Connecticut, for a determination that the estate taxes should be apportioned under the terms of the state statute. Notice of the application was given to the District Director of

[1] The deficiency was assessed at $1,333,194.35, plus interest. If the proration statute is applicable, as the executor has contended, the marital deduction attributable to the widow's trust would be approximately $3,600,000. If the statute is not applicable, as the Commissioner has held, the marital deduction would be approximately $1,700,000.

Internal Revenue, but, in accord with the Service's consistent position with reference to such state proceedings, Mim. 6134, Apr. 3, 1947, 1947 CCH Fed. Tax Rep. ¶ 6137, no appearance was entered in his behalf.

Apart from the executor's application, the probate court had the benefit only of argument from the guardian *ad litem* of the grandchildren; the guardian acknowledged that proration under the statute would place the burden of the estate tax entirely upon his wards' trusts, but nevertheless concluded that he had "no objection" to the executor's application. The court, filing a written opinion, determined that the decedent's disclaimer of the statute was ambiguous, and therefore concluded that the statute was applicable. Petitioner thereupon paid the assessed deficiency, and brought this suit for a refund. The District Court and the Court of Appeals both concluded that, because of the character of Connecticut's probate court system,[2] the state judgment was not conclusive of the applicability of the proration statute. 222 F. Supp. 446; 351 F. 2d 489.

In No. 673, *Estate of Bosch,* the decedent created in 1930 a revocable *inter vivos* trust in favor of his wife, which also granted to her a general testamentary power of appointment over the corpus. In 1951, the decedent's wife, in order to take advantage of the Powers of Appointment Act of 1951, 65 Stat. 91, executed an instrument which purportedly converted the general power into a special power of appointment. Upon the decedent's death in 1957, his executor sought a marital deduction for the amount of the *inter vivos* trust; under § 2056

[2] The District Court concluded that Connecticut probate courts are not courts of records (but see *Shelton* v. *Hadlock,* 62 Conn. 143, 25 A. 483, and 1 Locke & Kohn, Connecticut Probate Practice 30 (1951)), that its decrees are without legal effect in the State's higher courts, and that their decrees are also subject to collateral attack even in another probate district. 222 F. Supp., at 457; see also 351 F. 2d, at 494.

(b)(5), the trust would qualify for the deduction only if the decedent's wife held at his death a general power of appointment over the corpus.

The Commissioner, on the basis of the release signed in 1951 by the widow, disallowed the deduction, but the executor sought from the Tax Court a redetermination of the resulting deficiency. While the Tax Court proceeding was still pending, the executor petitioned in the New York Supreme Court for a determination under state law of the validity of the 1951 release. The Tax Court, with the Commissioner's assent, temporarily suspended its proceeding. In the state court, each of the three parties—the trustee, the widow, and the guardian *ad litem* of an infant who was a possible beneficiary—contended that the release was a nullity. The state court adopted their unanimous view. The Tax Court thereupon accepted the state trial court decision as an "authoritative exposition" of the requirements of state law. 43 T. C. 120. A divided Court of Appeals affirmed. 363 F. 2d 1009.

II.

The issue here, despite its importance in general, is essentially quite a narrow one. The questions of law upon which taxation turns in these cases are not among those for which federal definitions or standards have been provided; compare *Burnet* v. *Harmel*, 287 U. S. 103, 110; *Heiner* v. *Mellon*, 304 U. S. 271, 279; *Lyeth* v. *Hoey*, 305 U. S. 188, 194; it is, on the contrary, accepted that federal tax consequences have here been imposed by Congress on property rights as those rights have been defined and delimited by the pertinent state laws. The federal revenue interest thus consists entirely of the expectation that the absence or presence of the rights will be determined accurately in accordance with the prevailing state rules. The question here is, however, not how state law must in the context of federal taxation

ordinarily be determined; it is instead the more narrow one of whether and under what conditions a lower state court adjudication of a taxpayer's property rights is conclusive when subsequently the federal tax consequences of those rights are at issue in a federal court.

The problem may not, as the Court properly observes, be resolved by reference to the principles of *res judicata* or collateral estoppel, see generally *Cromwell* v. *County of Sac,* 94 U. S. 351, 352–353; the Revenue Service has not, and properly need not have, entered an appearance in either of the state court proceedings in question here. Nor do the pertinent provisions of the revenue laws, or their legislative history, provide an adequate guide to the solution of the problem; the only direct reference in that lengthy history relevant to these questions is imprecise and equivocal.[3] The cases in this Court are scarcely more revealing; they are, as Judge Friendly remarked below, "cryptic" and "rather dated." 363 F. 2d 1009, 1015.

It is, of course, plain that the Rules of Decision Act, 28 U. S. C. § 1652, is applicable here, as it is, by its terms, to any situation in which a federal court must ascertain and apply the law of any of the several States. Nor may it be doubted that the judgments of state courts must be accepted as a part of the state law to which the Act gives force in federal courts, *Erie R. Co.* v. *Tompkins,* 304 U. S. 64; it is not, for that purpose,

[3] A supplementary report of the Senate Finance Committee, concerned with the legislation which eventually became the Revenue Act of 1948, said simply that "proper regard should be given to interpretations of the will rendered by a court in a bona fide adversary proceeding." S. Rep. No. 1013, Pt. 2, 80th Cong., 2d Sess., 4. This language is doubtless broadly consistent with virtually any resolution of these issues, but it is difficult to see the pertinence of the sentence's last four words if, as the Court suggests, conclusiveness was intended to be given to the State's highest court, but to none other.

material whether the jurisdiction of the federal court in a particular case is founded upon diversity of citizenship or involves a question arising under the laws of the United States.[4] This need not mean, however, that every state judgment must be accepted by federal courts as conclusive of state law. The Court has, for example, never held, even in diversity cases, where the federal interest consists at most in affording a "neutral" forum, that the judgments of state trial courts must in all cases be taken as conclusive statements of state law;[5] apart from a series of cases decided at the 1940 Term,[6] the Court has consistently acknowledged that the character both of the state proceeding and of the state court itself may be relevant in determining a judgment's conclusiveness as a statement of state law.[7] This same result must

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[4] See, *e. g., Maternally Yours, Inc.* v. *Your Maternity Shop, Inc.*, 234 F. 2d 538; Friendly, In Praise of *Erie*—and of the New Federal Common Law, 39 N. Y. U. L. Rev. 383, 408, n. 122; Note, The Competence of Federal Courts to Formulate Rules of Decision, 77 Harv. L. Rev. 1084, 1087.

[5] See *King* v. *Order of Travelers*, 333 U. S. 153. Compare *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 204, 209–211.

[6] *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169; *Six Companies of California* v. *Joint Highway District*, 311 U. S. 180; *West* v. *A. T. & T. Co.*, 311 U. S. 223; and *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464. See also *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538. All these cases, with the possible exception of *Field*, and apart from the rather different issue in *Vandenbark*, concerned intermediate state courts. They have been strongly and repeatedly criticized by commentators. Judge Friendly, for example, described them as "outrages," *supra*, at 401. See also Corbin, The Laws of the Several States, 50 Yale L. J. 762, 766–768; Clark, State Law in the Federal Courts, 55 Yale L. J. 267, 290–292; and 2 Crosskey, Politics and the Constitution 922–927 (1953). It may also be wondered whether these cases have any vitality left after *King* and *Bernhardt*, *supra*.

[7] *Freuler* v. *Helvering*, 291 U. S. 35; *King* v. *Order of Travelers*, *supra*; *Bernhardt* v. *Polygraphic Co.*, *supra*.

surely follow *a fortiori* in cases in which the application of a federal statute is at issue.

Similarly, it is difficult to see why the formula now ordinarily employed to determine state law in diversity cases—essentially that, absent a recent judgment of the State's highest court, state cases are only data from which the law must be derived—is necessarily applicable without modification in all situations in which federal courts must ascertain state law. The relationship between the state and federal judicial systems is simply too delicate and important to be reduced to any single standard. See Hill, The Erie Doctrine in Bankruptcy, 66 Harv. L. Rev. 1013; Note, The Competence of Federal Courts to Formulate Rules of Decision, 77 Harv. L. Rev. 1084. Compare, *e. g.*, *Morgan* v. *Commissioner*, 309 U. S. 78, 80–81; Cardozo, Federal Taxes and the Radiating Potencies of State Court Decisions, 51 Yale L. J. 783. The inadequacy of this formula is particularly patent here, where, unlike the cases in which it was derived, the federal court is confronted by precisely the legal and factual circumstances upon which the state court has already passed.

Accordingly, although the Rules of Decision Act and the *Erie* doctrine plainly offer relevant guidance to the appropriate result here, they can scarcely be said to demand any single conclusion.

III.

Given the inconclusiveness of these sources, it is essential to approach these questions in terms of the various state and federal interests fundamentally at stake. It suffices for present purposes simply to indicate the pertinent factors. On one side are certain of the principles which ultimately are the wellsprings both of the Rules of Decision Act and of the *Erie* doctrine. First among those is the expectation that scrupulous

adherence by federal courts to the provisions of state law, as reflected both in local statutes and in state court decisions, will promote an appropriate uniformity in the administration of law within each of the States. Uniformity will, in turn, assure proper regard in the federal courts for the areas of law left by the Constitution to state discretion and administration, and, in addition, will prevent the incongruity that stems from dissimilar treatment by state and federal courts of the same or similar factual situations. Finally, it must be acknowledged that state courts are unquestionably better positioned to measure the requirements of their own laws; even the lowest state court possesses the tangible advantage of a close familiarity with the meaning and purposes of its local rules of law.

On the other side are important obligations which spring from the practical exigencies of the administration of federal revenue statutes. It can scarcely be doubted that if conclusiveness for federal tax purposes were attributed to any lower state court decree, whether the product of genuinely adversary litigation or not, there would be many occasions on which taxpayers might readily obtain favorable, but entirely inaccurate, determinations of state law from unsuspecting state courts. One need not, to envision this hazard, assume either fraud by the parties or any lack of competence or disinterestedness among state judges; no more would be needed than a complex issue of law, a crowded calendar, and the presentation to a busy judge of but essentially a single viewpoint. The consequence of any such occurrence would be an explication of state law that would not necessarily be either a reasoned adjudication of the issues or a consistent application of the rules adopted by the State's appellate courts.

It is difficult to suppose that adherence by federal courts to such judgments would contribute materially to

the uniformity of the administration of state law, or that the taxpayer would be unfairly treated if he were obliged to act, for purposes of federal taxation, as if he were governed by a more accurate statement of the requirements of state law. Certainly it would contribute nothing to the uniformity or accuracy of the administration of the federal revenue statutes if federal courts were compelled to adhere in all cases to such judgments.[8]

IV.

The foregoing factors might, of course, be thought consistent with a variety of disparate resolutions of the questions these two cases present. If emphasis is placed principally upon the importance of uniformity in the application of law within each of the several States, and thereby upon the apparent unfairness to an individual taxpayer if an issue of state law were differently decided by state and federal courts, it might seem appropriate to accept, in all but the most exceptional of circumstances, the judgment of any state court that has addressed the question at issue. This is the viewpoint identified with the opinion of the Court of Appeals for the Third Circuit in *Gallagher* v. *Smith*, 223 F. 2d 218; it is, in addition, apparently the rule adopted today by my Brother DOUGLAS. Conversely, if emphasis is placed principally upon the hazards to the federal fisc from dubious decisions of lower state courts, it might be thought necessary to require federal courts to examine for themselves, absent a judgment by the State's highest court, the content in each case of the pertinent state law. This, as I understand it, is the rule adopted by a majority of the Court today.

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[8] See, on the importance of uniformity in federal taxation, *Hylton* v. *United States*, 3 Dall. 171, 180; Cahn, Local Law in Federal Taxation, 52 Yale L. J. 799.

In my opinion, neither of these positions satisfactorily reconciles the relevant factors involved. The former would create excessive risks that federal taxation will be evaded through the acquisition of inadequately considered judgments from lower state courts, resulting from proceedings brought, in reality, not to resolve truly conflicting interests among the parties but rather as a predicate for gaining foreseeable tax advantages, and in which the point of view of the United States had never been presented or considered. The judgment resulting from such a proceeding might well differ only in form from a consent decree. The United States would be compelled either to accept as binding upon its interests such a judgment, or to participate in every state court proceeding, brought at the taxpayer's pleasure, which might establish state property rights with federal tax consequences.

The second position, on the other hand, would require federal intervention into the administration of state law far more frequently than the federal interests here demand; absent a judgment of the State's highest court, federal courts must under this rule re-examine and, if they deem it appropriate, disregard the previous judgment of a state court on precisely the identical question of state law. The result might be widely destructive both of the proper relationship between state and federal law and of the uniformity of the administration of law within a State.

The interests of the federal treasury are essentially narrow here; they are entirely satisfied if a considered judgment is obtained from either a state or a federal court, after consideration of the pertinent materials, of the requirements of state law. For this purpose, the Commissioner need not have, and does not now ask, an opportunity to relitigate in federal courts every issue of state law that may involve federal tax consequences; the federal interest requires only that the Commissioner be per-

mitted to obtain from the federal courts a considered adjudication of the relevant state law issues in cases in which, for whatever reason, the state courts have not already provided such an adjudication. In turn, it may properly be assumed that the state court has had an opportunity to make, and has made, such an adjudication if, in a proceeding untainted by fraud, it has had the benefit of reasoned argument from parties holding genuinely inconsistent interests.

I would therefore hold that in cases in which state-adjudicated property rights are contended to have federal tax consequences, federal courts must attribute conclusiveness to the judgment of a state court, of whatever level in the state procedural system, unless the litigation from which the judgment resulted does not bear the indicia of a genuinely adversary proceeding. I need not undertake to define with any particularity the weight I should give to the various possible factors involved in such an assessment; it suffices to illustrate the more important of the questions which I believe to be pertinent. The principal distinguishing characteristic of a state proceeding to which, in my view, conclusiveness should be attributed is less the number of parties represented before the state court than it is the actual adversity of their financial and other interests. It would certainly be pertinent if it appeared that all the parties had instituted the state proceeding solely for the purpose of defeating the federal revenue. The taking of an appeal would be significant, although scarcely determinative. The burden would be upon the taxpayer, in any case brought either for a redetermination of a deficiency or for a refund, to overturn the presumption, *Welch* v. *Helvering,* 290 U. S. 111, 115, that the Commissioner had correctly assessed the necessary tax by establishing that the state court had had an opportunity to make, and had made, a reasoned resolution of the

state law issues, after a proceeding in which the pertinent viewpoints had been presented. Proceedings in which one or more of the parties had been guilty of fraud in the presentation of the issues to the state court would, of course, ordinarily be entitled to little or no weight in the federal court's determination of state law.

I recognize, of course, that this approach lacks the precision of both the contrasting yardsticks suggested by the Court and by my Brother DOUGLAS. Yet I believe that it reflects more faithfully than either of those resolutions the demands of our federal system and of the competing interests involved.[9]

V.

I would apply these general principles to the present cases in the following manner. In No. 240, the Court of Appeals agreed with the District Court that "it was unnecessary" to make a finding on whether the proceedings in the Connecticut probate court were collusive or "nonadversary," since the decrees of the probate court could " 'under no circumstances' " be considered binding. 351 F. 2d 489, 494. I would therefore vacate the judgment of the Court of Appeals and remand the cause for

[9] It may be doubted, however, whether this approach would actually produce serious practical disadvantages. It is essentially the standard which has been embodied in the Treasury Regulations since 1919, see now Treas. Reg. §§ 20.2053–1(b) (2), 20.2056(e)–2(d) (2), and which was urged before this Court in these cases by counsel for the United States. It is, moreover, similar to the standards employed in various opinions by a number of the courts of appeals. See, *e. g., Saulsbury* v. *United States,* 199 F. 2d 578; *Brodrick* v. *Gore,* 224 F. 2d 892; *In re Sweet's Estate,* 234 F. 2d 401; *Old Kent Bank & Trust Co.* v. *United States,* 362 F. 2d 444. See also Cahn, *supra,* at 818–819; Braverman & Gerson, The Conclusiveness of State Court Decrees in Federal Tax Litigation, 17 Tax L. Rev. 545. If any practical difficulties actually attend this standard, they have apparently not, despite its wide use, yet appeared.

further proceedings in accordance with the views expressed herein.

In No. 673, the Court of Appeals apparently concluded that, absent fraud or collusion, any state court proceeding which terminates in a judgment binding on the parties as to their rights under state law is also conclusive for purposes of federal taxation. 363 F. 2d 1009, 1014. I would therefore reverse the judgment of the Court of Appeals, and again would remand the cause for further proceedings consistent with the views expressed in this opinion.

MR. JUSTICE FORTAS, dissenting.

While I join the dissenting opinion of my Brother HARLAN, I believe it appropriate to add these few comments. As my Brother HARLAN states, in a case in which federal tax consequences depend upon state property interests, a federal court should accept the final conclusion of a competent state court, assuming that such a conclusion is an adjudication of substance arrived at after adversary litigation and on the basis of the same careful consideration that state courts normally accord cases involving the determination of state property interests. The touchstone of whether the state proceeding was "adversary" is not alone entirely satisfactory. I think that this concept has been helpfully embellished by Judge Raum of the United States Tax Court in the *Bosch* case, 43 T. C. 120, 123–124. Judge Raum suggests that among the factors to be considered in determining whether the decision of the state court is to be accepted as final for federal tax purposes are the following: whether the state court had jurisdiction, and whether its determination is fully binding on the parties; whether, in practice, the decisions of the state court have precedential value throughout the State; whether the Commissioner was aware of the state proceedings and had an

opportunity to participate; whether the state court "rendered a reasoned opinion and reached a 'deliberate conclusion', *Blair* v. *Commissioner,* 300 U. S. [5] at p. 10"; whether the state decision has potentially offsetting tax consequences in respect of the state court litigant's federal taxes; and, in general, whether the state court decision "authoritatively determined" future property rights, and thus, as Judge Raum stated, "provided more than a label for past events . . . ."

Syllabus.

DENVER & RIO GRANDE WESTERN RAILROAD CO. ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO.

No. 305. Argued March 16, 1967.—Decided June 5, 1967.

Railway Express Agency (REA) applied to the Interstate Commerce Commission (ICC) for authorization under § 20a of the Interstate Commerce Act to sell 500,000 authorized but unissued shares of its stock to Greyhound Corporation. Greyhound agreed, upon acquisition of these shares, to offer for 60 days to purchase up to 1 million shares of outstanding REA stock, all of which is owned by railroads which have the right of first refusal. REA and Greyhound had entered into a "Memorandum of Understanding" which contemplated efficiencies and savings through consolidation of terminal facilities, garages, communications, advertising, and sales forces. Section 20a (2) of the Act provides for ICC authorization of a carrier's stock issuance if "for some lawful object within [the applicant's] corporate purposes, and compatible with the public interest." Finding the issuance of the 500,000 shares for sale to Greyhound to be urgently needed, the ICC authorized the issuance under § 20a without a hearing, and declined to decide, pending the outcome of Greyhound's 60-day offer, the questions of control under § 5 of the Interstate Commerce Act or anticompetitive effect under § 7 of the Clayton Act. A three-judge District Court sustained the ICC order. *Held:*

1. The ICC is required, as a general rule, under its duty to determine that the proposed transaction is in the "public interest" and for a "lawful object," to consider control and anticompetitive consequences before approving a stock issuance under § 20a (2) of the Interstate Commerce Act. Pp. 492–498.

2. The ICC did not exceed its discretion in deferring consideration of the issue of REA's control by Greyhound, as radical changes in the relevant facts might take place in the 60-day period, and it is highly unlikely that any harm could flow to appellants or to the public interest from a deferral limited to that issue. Pp. 499–501.

3. The ICC exceeded its discretion in deferring consideration of the anticompetitive issues. Pp. 501–507.

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(a) While the ICC's duty to consider anticompetitive issues under the public interest standard of § 5 of the Interstate Commerce Act arises only after a threshold finding of control, no such preliminary finding need be made to trigger the ICC's duty under the Clayton Act. P. 501.

(b) With respect to at least some of the anticompetitive issues presented by REA's application the relevant facts will not change significantly during the 60-day period. Pp. 502–503.

(c) With Greyhound's holding of 500,000 shares (20%) of REA's stock there is likely to be immediate and continuing cooperation between the companies, which appellants claim will be to their detriment and which the Government concedes may be against the public interest. If such an alliance would in fact be against the public interest, § 7 of the Clayton Act requires that it be stopped in its incipiency. P. 504.

(d) Before the ICC can justify a diversification of ownership on the grounds that REA has an urgent need for funds and would be better off more independent of the railroads, it must consider whether the action approved would operate to the detriment of REA or the public interest. Pp. 505–506.

(e) There is little merit to the Government's contention that deferral of the anticompetitive issues is strongly supported by considerations of administrative convenience. Pp. 506–507.

255 F. Supp. 704, reversed and remanded.

William H. Dempsey, Jr., argued the cause for appellants. With him on the briefs were *Jeremiah C. Waterman, Royce D. Sickler, C. W. Fiddes, David Axelrod, Eugene T. Lüpfert, Benjamin W. Boley, Martin J. Flynn, Giles Morrow, Peter T. Beardsley, Harry Jordan* and *R. Edwin Brady.*

Robert S. Rifkind argued the cause for the United States et al. With him on the brief were *Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Robert W. Ginnane* and *Betty Jo Christian. Thomas D. Barr* argued the cause for appellees Railway Express Agency, Inc., et al. *Mr. Barr* filed a brief for Railway Express Agency, Inc. *Owen Jameson* filed a brief for appellee Greyhound Corp.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question in this case is whether the Interstate Commerce Commission complied with its statutory responsibilities under § 20a of the Interstate Commerce Act [1] when it approved without consideration of control or anticompetitive consequences the issuance to appellee Greyhound Corporation of 500,000 shares of the common stock of appellee Railway Express Agency, Inc. (REA).

REA provides railroad express service and is also a motor common carrier. The approximately 2,000,000 shares of REA common stock outstanding are entirely owned by railroads and no railroad stockholder may dispose of its shares without first offering them to the other railroad stockholders. REA also is authorized, however, to issue 500,000 additional shares of common stock without first offering them to its stockholders. Greyhound, which operates an express carrier service through its wholly owned subsidiary Greyhound Lines, Inc., a motor carrier of passengers and express subject to the Interstate

[1] Section 20a of the Interstate Commerce Act, as amended, 41 Stat. 494, 49 U. S. C. § 20a, provides in pertinent part:

"(2) It shall be unlawful for any carrier to issue any share of capital stock . . . even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, . . . the Commission by order authorizes such issue . . . . The Commission shall make such order only if it finds that such issue . . . (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose."

Common carriers by motor vehicle are made subject to the provisions of § 20a (2) by § 214 of the Act, as amended, 49 Stat. 557, 49 U. S. C. § 314.

Commerce Act, agreed to purchase these 500,000 shares. REA thereupon applied to the ICC for an order under § 20a approving the transaction. Minority railroad REA stockholders, motor bus competitors of Greyhound, motor carriers, and freight forwarders intervened in the proceeding to protest against approval of the transaction. They alleged, among other things, the necessity of a hearing on the questions whether Greyhound's acquisition of the stock was in the "public interest" and for a "lawful object" as those terms are used in § 20a. The ICC approved the acquisition without a hearing. A three-judge District Court for the District of Colorado sustained the ICC order. 255 F. Supp. 704. We noted probable jurisdiction. 385 U. S. 897. We reverse with direction to the District Court to enter a new judgment remanding the case to the ICC for further proceedings consistent with this opinion.

I.

REA was organized in 1929 and until 1961 operated on a nonprofit basis under a pooling agreement with the railroads. See *Securities and Acquisition of Control of Railway Express Agency, Inc.*, 150 I. C. C. 423. Financial difficulties forced abandonment of the nonprofit operation and REA was converted to a profit and loss basis in order to effect more efficient and economic operation. See *Express Contract, 1959*, 308 I. C. C. 545, 549–550. In addition, REA was released from restrictions against use of carriers other than railroads. In 1963 REA's by-laws were amended to eliminate a limitation against stock ownership except by railroads; the disposition of shares by a railroad, however, was made subject to the right of first refusal of the other railroad stockholders. The issuance of 500,000 additional shares not subject to the right of first refusal was also authorized, but only upon the consent of two-thirds of the railroad stockholders.

Greyhound, principally a passenger carrier, became interested in expanding its growing express business. In January 1964 Greyhound offered to purchase, subject to ICC approval, at least 67% of REA's stock, of which Greyhound intended to offer 16% to major airlines. Greyhound also agreed to finance part of REA's capital requirements as part of a plan to coordinate the express services of both companies. This proposal was defeated by railroad stockholders.

REA and Greyhound persisted in their efforts to coordinate their operations. Greyhound proposed to acquire a 20% interest in REA through acquisition of REA's 500,000 authorized but unissued shares, stating that its "interest in REA . . . stems primarily from our views as to the improvements . . . which could be realized through combination and correlation of certain of our facilities and services." Greyhound offered to pay $16 per share if permitted to name one-fifth of the REA Board of Directors and if the REA Board would declare its intention "to consider seriously and work toward a long-term agreement between REA and Greyhound to consolidate operating functions and facilities . . . ," and if, further, the REA Board would agree "to consider seriously at a later time . . ." the sale of REA stock to airlines and the general public. Finally, Greyhound offered, if permitted to acquire the 500,000 shares, to purchase enough additional shares at $25 each to give it 50% of the stock of REA, the offer to remain open for 60 days following Greyhound's acquisition of the 500,000 shares. It expressed willingness, however, to purchase the 500,000 shares and leave "to the future the question of the acquisition of additional shares by Greyhound and giving the railroads an opportunity to reconcile their views on this question."

REA countered with an offer to sell the 500,000 shares at $20 per share provided Greyhound would agree to

offer within the 60-day period to purchase an additional 1,000,000 shares of the outstanding stock at the same price. The agreement was consummated on this basis subject to ICC approval.

REA's application to the ICC sought approval only of the issuance to Greyhound of the 500,000 shares. The application was supplemented with detailed data reviewing the negotiations, a statement of REA's financial condition and a statement of the purposes to which the $10,000,000 realized from the sale of the 500,000 shares would be applied. The burden of the protests of numerous intervenors was that the transaction was not in the "public interest" and for a "lawful object," but rather was the first step toward establishing a virtual monopoly of express transportation, and would result in "control" by Greyhound of REA, necessitating a hearing under § 5 of the Act.[2] The Department of Justice also intervened. It urged the ICC to conduct a hearing to determine whether the transaction would violate § 7 of the Clayton Act,[3] suggesting that, while a § 5 proceeding might be

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[2] Section 5 (2) (a) (i) of the Act, as amended, 41 Stat. 480, 482, 49 U. S. C. § 5 (2) (a) (i), authorizes any carrier, with the approval and authorization of the Commission, "to acquire control of another through ownership of its stock or otherwise . . . ." Upon application of a carrier seeking such authority, the Commission "shall afford reasonable opportunity for interested parties to be heard," and if "the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) . . . and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable . . . ." § 5 (2) (b).

[3] Section 7 of the Clayton Act, as amended, 38 Stat. 731, 15 U. S. C. § 18, provides in pertinent part:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock . . . of another corpo-

unnecessary, one might be instituted and consolidated with the recommended Clayton Act § 7 proceeding, since the anticompetitive issues involved would be virtually identical.

Division Three of the ICC approved the application without hearing, ruling that investigation into the "control" and "anticompetitive" issues "would not be appropriate at this time . . . ." After the ICC denial of petitions for reconsideration this action to enjoin and set aside the ICC order was filed. The full Commission meanwhile reconsidered and affirmed the action of Division Three but postponed the effective date of the order pending the conclusion of judicial proceedings.

In the District Court the parties adhered basically to the positions maintained before the ICC, except that the Department of Justice abandoned its position urging a hearing on the § 7 question and declined either to support or to oppose the ICC order. In sustaining the order the District Court reasoned that, while the ICC might be required in some circumstances to consider "control" and "anticompetitive" issues before approving a stock issuance under § 20a, the ICC properly exercised discretion to defer consideration of such questions in this case until after it was determined whether and to what extent Greyhound would succeed in purchasing additional shares from railroad stockholders; only then would the "chain of events started by the stock issuance . . . [be] ascertainable rather than conjectural." 255 F. Supp. 704, 709.

In this Court the Government concedes, and the other appellees assume *arguendo,* that important issues of "control" and "anticompetitive" effects were involved in the application before the ICC. The Government has completely reversed its position from what it was before

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ration engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

the ICC, arguing here that § 20a was designed to accomplish only the limited objective of protecting stockholders and the public from fiscal manipulation, and that, in any event, postponement of consideration of "control" and "anticompetitive" issues was justified in this case because the facts relevant to both issues might be wholly different at the end of the 60-day period, and because no prejudice to any party's interests could result from the delay.

II.

We do not agree that Congress limited ICC consideration under § 20a to an inquiry into fiscal manipulation.[4] Even if Congress' primary concern was to prevent such manipulation, the broad terms "public interest" and "lawful object" negate the existence of a mandate to the ICC to close its eyes to facts indicating that the transaction may exceed limitations imposed by other relevant laws. Common sense and sound administrative policy point to the conclusion that such broad statutory standards require at least some degree of consideration of control and anticompetitive consequences when suggested by the circumstances surrounding a particular transaction. Both the ICC and this Court have read terms such as "public interest" broadly, to require consideration of all important consequences including anticompetitive effects. Thus the ICC is required to weigh anticompetitive effects in approving applications for merger or control under § 5 of the Act, authorizing the ICC to grant such applica-

[4] Section 20a was originally § 437 (1) of H. R. 10453, 66th Cong., which was almost identical to earlier legislation passed by the House in 1910 and 1914. See 58 Cong. Rec. 8317–8318 (1919). The 1910 version led to a study which condemned as a "public evil" intercorporate holdings of railroad stock. Report of the Railroad Securities Commission, H. R. Doc. No. 256, 62d Cong., 2d Sess., 21 (1911). These findings were part of the background against which Congress eventually passed § 20a, along with the Federal Trade Commission and Clayton Acts.

tions only if "consistent with the public interest." *McLean Trucking Co.* v. *United States*, 321 U. S. 67. And similarly broad responsibilities are encompassed within like broad directives addressed to other agencies. *E. g.*, *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 224; *FCC* v. *RCA Communications, Inc.*, 346 U. S. 86, 94; *California* v. *FPC*, 369 U. S. 482, 484–485.

It is true that the requirement that the ICC consider anticompetitive effects is more readily found under § 5, since § 5 (11) enables the ICC to confer immunity from the antitrust laws for transactions approved under § 5 (2).[5] But the foundations of the ICC's obligation under § 5 are largely applicable to § 20a as well. Section 20a, like § 5, must after all be read in the context of overall ICC responsibilities. The responsibility under § 11 of the Clayton Act [6] to enforce that Act's provisions is one of them. The responsibility to advance the National Transportation Policy, read into the "public interest" standard of § 5, is another persistent and overriding duty, equally applicable to § 20a. In sum, as we said in *McLean Trucking, supra,* while transportation "legislation constitutes the immediate frame of reference within

[5] Section 5 (11), 49 U. S. C. § 5 (11), provides that "any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized . . . shall be and they are relieved from the operation of the antitrust laws . . . ."

[6] Section 11 of the Clayton Act, 15 U. S. C. § 21, provides in pertinent part: "(a) Authority to enforce compliance with . . . [§ 7] by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended . . . . (b) Whenever the Commission . . . shall have reason to believe that any person is violating . . . [§ 7] it shall issue . . . a complaint . . . containing a notice of a hearing . . . . The person so complained of shall have the right to . . . show cause why an order should not be entered by the Commission . . . requiring such person to cease and desist from the violation . . . ."

which the Commission operates . . . and the policies expressed in it must be the basic determinants of its action . . . , in executing those policies the Commission may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view. When this is true, it cannot, without more, ignore the latter." 321 U. S., at 80.

In proceedings under § 20a (2), the ICC itself has not acted as though it lacks the power or responsibility to weigh anticompetitive consequences. In *Columbia Terminals Co.—Issuance of Notes,* 40 M. C. C. 288, 293, an application to issue notes under § 20a (2) was granted in part only on the condition that the notes be made the subject of competitive bidding. The ICC explicitly rejected the argument that § 10 of the Clayton Act, 15 U. S. C. § 20, requiring competitive bidding in certain situations, was superseded by § 20a. In *Stock of New Jersey, I. & I. R. Co.,* 94 I. C. C. 727, 729, the Commission said, in considering an application to issue stock: "[I]t can not be said that in the performance of the broad duty imposed upon us by the statute we must confine our investigation and consideration to the effect of proposed issues upon the carrier immediately involved. In any application to us for authority to issue securities we are bound to measure the proposal by the test of public interest in whatever phase that interest may appear to be affected."

This "broad duty" was significantly adhered to in *Chesapeake & O. R. Co. Purchase,* 271 I. C. C. 5. There, the C & O sought modification of an earlier order so as to enable it to acquire and exercise 400,000 shares of New York Central, and two of C & O's directors sought authority under § 20a (12) to hold seats simultaneously on the Central Board. C & O and its directors alleged, in terms strikingly similar to the claims in this case, that Central

needed funds and new management, and that the two companies were contemplating plans of mutual advantage and ultimately a merger under § 5 (2). The ICC took a broad view of its power and responsibility. It found, as to the § 20a (12) issue, that an insufficient showing had been made that "neither public nor private interests . . ." would be adversely affected by the proposed interlocking directorate, citing its own cases to the effect that authority would be granted under § 20a (12) only where no lessening of competition or independence occurred, 271 I. C. C., at 18, and pointing out that, even if the Central were strengthened, an interlocking directorate might injure other railroads in which the "public has just as great an interest . . . ," 271 I. C. C., at 40. In treating the request that it approve the stock acquisition, the ICC referred in great detail to the facts that (1) the acquisition, when considered along with long-range plans, would result in C & O control of Central; (2) extensive competition between C & O and Central would be eliminated; and (3) cooperation between C & O and Central would pose a substantial threat to another railroad, 271 I. C. C., at 24–29. It refused to authorize the acquisition, concluding that it was in effect being asked "to sanction a violation of the provisions of section 5 (4) [requiring carriers to request authority under § 5 (2) before acquiring control of another carrier] and also a violation of section 7 of the Clayton Antitrust Act." 271 I. C. C., at 39, 43. It stated that, if the applicants were so confident that their long-run aims would be in the public interest, they should seek authority for control under § 5 (2). These principles and arguments relied upon by the ICC in rejecting C & O's application are equally applicable here. The economic consequences do not differ because we are concerned here with the issuance of stock rather than an acquisition on the open market.

Appellees argue, with some ambivalence, that it would be anomalous to require the ICC to consider anticompetitive issues under § 20a (2). The ICC is authorized under § 5 to grant antitrust immunity for consolidations. No such power exists under § 20a,[7] and the Government contends therefore that to require consideration of § 7 issues under § 20a would lead to the "anomalous conclusion that a securities issue may have to be disallowed even though it might be the first step in an acquisition of control that the Commission could, on proper findings, authorize under section 5 notwithstanding antitrust considerations." REA advances a variant of this argument pointing out that the Sixty-sixth Congress, which passed both § 5 and § 20a, would not have "adopted the erratic policy of relaxing enforcement of the antitrust laws when competition was eliminated but requiring strict enforcement when lesser competitive harm might occur."

First, it is by no means true that greater competitive harm necessarily results from consolidations than from stock issuances under § 20a. A particular consolidation may be in the public interest because it increases competition in some respects, while a stock issuance, even though not involving control, may have no similar redeeming feature. Second, any anomaly which may be created by the juxtaposition of §§ 5 and 20a stems, not

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[7] In *Pan American World Airways* v. *United States*, 371 U. S. 296, we held that Congress had entrusted the narrow questions there presented to the CAB; but the violations alleged were of the Sherman Act, which unlike the Clayton Act, 15 U. S. C. § 21, *supra*, n. 6, contains no provision imposing an affirmative duty upon the agency to enforce the Act's provisions. The industry there was one "regulated under a regime designed to change the prior competitive system," *id.*, at 301, and the CAB could have retained power and granted antitrust immunity for the actions involved had they occurred after passage of § 411 of the Civil Aeronautics Act of 1938, 52 Stat. 1003, *id.*, at 312.

from the fact that no immunity may be granted under § 20a, but from the ICC's special power under § 5. The obligation to enforce the Clayton Act is the rule, and § 5 is the exception. Finally, there are good reasons upon which Congress may have relied in providing that immunity might be conferred under § 5 but not under § 20a. Congress recognized in the Transportation Act of 1940, 54 Stat. 898, as it had in the Act of 1920, that railroad consolidations often result in benefits for the national transportation system as well as for the railroads involved. Consequently, it authorized the ICC to approve consolidations and to immunize them from the antitrust laws when they were found to be in the public interest. The special benefits sometimes realized from carrier consolidations are less likely to come about through the mere issuance of stock, unless the issuance results in control or merger; and when control or merger does result, the party acquiring control may invoke the Commission's power under § 5 to immunize the consolidation from the antitrust laws.

Appellees' reliance upon *Alleghany Corp.* v. *Breswick & Co.*, 353 U. S. 151, 355 U. S. 415, is misplaced. That litigation stands at most for the proposition that the ICC has discretion in some circumstances to consider § 20a issues without coming to grips with the question whether control of one carrier by another may be unlawful. Alleghany had acquired control of the New York Central without ICC approval. It applied to the ICC rather than to the Securities and Exchange Commission for approval of an issue of preferred stock. The ICC took jurisdiction on the ground that, while Alleghany was an investment company normally under the jurisdiction of the SEC, its control of Central made it a carrier subject to ICC regulation. The District Court set aside the order approving the issuance on the ground

that ICC jurisdiction to act under § 20a could not rest upon a control it had not approved. This Court reversed, pointing out that it would be contrary to the policy of the statute to oust the ICC of regulatory jurisdiction because a noncarrier had failed to abide by the law. On remand the District Court considered the illegality of Alleghany's control as relevant to the merits of the issuance under § 20a, and we reversed again, stating simply that the only issue left open on remand was whether the stock issue "as approved" was unlawful. 355 U. S. 415, 416. However this litigation may be interpreted, it wholly fails to support the proposition that, because § 20a was designed primarily to protect against fiscal manipulation, the ICC is relieved of the necessity of considering other issues germane to the transaction.

We conclude, [illegible] that the ICC is required, as a general rule, under its duty to determine that the proposed transaction is in the "public interest" and for a "lawful object," to consider the control and anticompetitive consequences before approving stock issuances under § 20a (2). This does not mean the ICC must grant a hearing in every case, or that it may never defer consideration of issues which arise when special circumstances are present. But it does mean that, when the ICC exercises its discretion to approve issuances without first considering important control and competition issues, the reviewing court must closely scrutinize its action in light of the ICC's statutory obligations to protect the public interest and to enforce the antitrust laws. Whether or not an abuse of discretion is present must ultimately depend upon the transaction approved, its possible consequences, and any justifications for the deferral. We turn now to this question, first with respect to the deferral of the control issue, and second with respect to the deferral of the anticompetitive issues.

III.

REA's proposed issuance of a 20% stock interest to Greyhound undoubtedly raised a serious question whether control of its operations might pass to Greyhound. Control under § 5 must be judged realistically, and is a matter of degree. See *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125. Even the 20% acquisition standing alone might raise an issue of control necessitating greater consideration than given it by the ICC, but it is clear from REA's own evidence that the purpose of its negotiations with Greyhound was to bring the two companies into a joint alignment. The 20% stock issuance was treated by both as the first step of a more ambitious project, and as evidence of the seriousness of each other's intentions to that end.

What the ICC has done must, however, be placed in perspective. It has not denied that a substantial issue of control is present, and it has not refused to consider the issue. It has held only that consideration should be deferred for the 60-day period during which Greyhound has agreed to extend to REA stockholders an offer to purchase up to 1,000,000 shares. We have stressed the unsatisfactory consequences which often occur when agencies defer action and leave parties uncertain as to their rights and obligations. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 510. We might also observe that the ICC apparently could have avoided the deferral by requiring REA and Greyhound to reform their contract so that all the facts relevant to the control issue could be ascertained before approval was given under § 20a (2).[8] Nevertheless, we cannot say that the

[8] A change in the agreement providing that Greyhound should offer to purchase the stock held by the railroads before the issuance of the 500,000 shares would have developed the relevant facts, and made unnecessary postponement of the determination of either the control or competition issue.

ICC exceeded its discretion when it deferred consideration of the control issue; radical changes in the relevant facts may take place during the 60-day period, and it is highly unlikely that any harm can flow to appellants or to the public interest from a deferral limited to that issue.

Resolution of the "public interest" issue under § 5, requiring consideration of anticompetitive and other consequences, is required when the threshold fact of control or merger is established. But in this case, even assuming that the 20% purchase may amount to "control" under the existing stock distribution, events may occur during the 60-day period which might negate this possibility. Some railroads have indicated their intention to sell their REA holdings, but whether Greyhound or the dissident railroads wind up in a controlling position may depend on the extent to which the latter exercise their right of first refusal. The dissident railroads have made clear their intention to prevent Greyhound from acquiring any additional shares, but even if they obtain one-third of REA's stock they will be able to determine the composition of REA's Board of Directors. In either case, the added power in the hands of the dissident roads may, depending on the circumstances, lead the ICC to find that Greyhound had not acquired control.[9] Thus the control question can more realistically be resolved with finality after the 60-day period.

Moreover, the ICC reasonably concluded that allowing Greyhound tentatively to acquire the 20% stock interest would not prejudice appellants as to the control issue

[9] If the dissident REA railroad stockholders exercised their right of first refusal to buy the 1,000,000 shares the other railroad stockholders might sell, their combined stockholdings would be increased to over 50% of the REA shares. See Brief for the United States and ICC, p. 18, n. 9.

in light of the dissident railroads' position that Greyhound would not acquire "one additional share under the offer to purchase up to one million shares . . . ," and because Greyhound would be unable under REA's bylaws to control the board, since its five directors would be faced by 18 railroad directors, any 13 of whom would have the power to prevent any action proposed by Greyhound.

IV.

The action of the Commission in deferring consideration of the anticompetitive issues stands on a different footing. The Commission's responsibility under § 5 and under the Clayton Act differs markedly, and the reasons which support an exercise of discretion as to the control issue are wholly inapplicable to the anticompetitive questions. There is, in short, no reasonable justification for deferring the Clayton Act questions.

The Commission is, of course, required to consider anticompetitive issues under the public interest standard of § 5, just as it must under the public interest standard of § 20a. But the duty under § 5, as we point out above, arises only after the threshold fact of control is established. No such preliminary finding need be made to trigger the ICC's duty under the Clayton Act. A company need not acquire control of another company in order to violate the Clayton Act. See, *e. g., United States* v. *du Pont & Co.*, 353 U. S. 586; *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 152 F. Supp. 387 (D. C. S. D. N. Y. 1957), aff'd, 259 F. 2d 524 (C. A. 2d Cir. 1958). Section 7 proscribes acquisition of "any part" of a company's stock where the effect "may be substantially to lessen competition, or to tend to create a monopoly." Moreover, the purpose of § 5 is significantly different from that of the Clayton Act. Section 5 is designed to enable carriers to seek and obtain approval of consolidations with other carriers, with immunity from the anti-

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trust laws. When a carrier effects a consolidation without ICC authority, the Commission can of course act under § 5 (4). But, as the Commission has often held, the carrier must initiate consolidations under § 5, and it is reasonable to expect that carriers will seek the benefits of that provision. In contrast, the Clayton Act is prohibitive, and imposes a positive obligation upon the ICC to act. The Commission is directed, whenever it has reason to believe any carrier within its jurisdiction is violating § 7, to "issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing . . . ." 15 U. S. C. § 21 (b). Section 16, 15 U. S. C. § 26, excepts from the power of private persons to bring § 7 suits for injunctive relief all cases involving matters subject to ICC jurisdiction. By thus limiting the authority of private persons to institute court proceedings to enjoin § 7 violations, this provision underscores the ICC's responsibility to act when such violations are brought to its attention.

One of the principal justifications advanced for the ICC's deferral of the control issue is that the facts relevant to that issue may change so significantly during the 60-day period that the control question could be settled either way. No such possibility exists with respect to at least some of the anticompetitive issues presented by REA's application. We need not accept the argument of appellants, based upon the distinction between "express" and other forms of transport, see, *e. g., Railway Express Agency, Inc., Extension—Nashua, N. H.*, 91 M. C. C. 311, 322, sustained *sub nom. Auclair Transportation, Inc.* v. *United States*, 221 F. Supp. 328 (D. Mass.), aff'd, 376 U. S. 514, that the 20% stock acquisition would itself violate § 7 because REA controls 88% and Greyhound 7% of the "express" market. For if appellees REA and Greyhound are correct that, because of the increasing cross-competition among groups carrying

transport, it is impossible to categorize REA as a carrier of "express," then the claims of appellant truck lines, freight forwarders and trucking associations take on added significance. It is precisely the increasing diversification of REA's transport activity, together with Greyhound's considerable capacity and the economies and efficiencies the two companies intend to effectuate jointly, that concerns these appellants.

It is clear that REA and Greyhound contemplate major changes in their operation which could have a significant impact upon competition for express and other types of transport which they seek to carry. The "Memorandum of Understanding" into which the companies entered about three weeks before REA agreed to Greyhound's 20% stock acquisition contemplates efficiencies and savings through consolidation of facilities for terminal service, of garages, and of communications, advertising and sales forces. These changes might therefore realize large savings for both REA and Greyhound, and in this way and other ways significantly strengthen their competitive position. And the Memorandum expresses a determination to engage in aggressive action to capture larger shares of express and transport business, especially by utilizing Greyhound's bus operations as a complement to REA's air and rail service. "The consolidation of effort by the two companies," the Memorandum states, "would create a new market with revenue opportunity arising from a complete package express service to the public." The "new ability" of the air express service to reach off-airline points would add significantly to REA and Greyhound revenues, and the new market would have an estimated growth potential of 10% per year. Similarly, rail-bus service was expected to generate millions in "new business," and to "create a new capability for the two carriers to compete in the ltl [less-than-load] market. The only foreseeable limitation to the

growth of this service would be the physical space limitations of Greyhound's fleet."

There is nothing in the record to rebut the allegations of many of the appellants that cooperation between Greyhound and REA of the sort contemplated by the Memorandum aided by the 20% stock acquisition will result in serious harm to appellants individually and to the public interest which they serve. The freight forwarders fear a great reduction in their business, as do the bus companies. Some of the bus companies, which engage in commuter transport, claim that Greyhound-REA cooperation would deprive them of their express business, and that, since that business makes economically feasible their commuter operations, would compel the termination of services essential to the public interest.

It cannot be said with assurance that deferral of consideration of the anticompetitive issues will in no way prejudice appellants or the public interest. The fact that the railroads presently control the REA Board of Directors is hardly relevant to that question. It is not the possibility of control that may prejudice appellants and the public interest, but simply the fact that with Greyhound holding 20% of REA's stock there is likely to be immediate and continuing cooperation between the companies, cooperation which appellants claim will be to their detriment and which the Government concedes may be against the public interest. If appellants are correct, and if such an alliance would in fact be against the public interest, then § 7 of the Clayton Act requires that it be stopped in its incipiency. Cf. *FTC* v. *Dean Foods Co.*, 384 U. S. 597, 606, n. 5.

We are told that REA is in need of funds, and that ICC approval of the 20% stock acquisition assures that REA will obtain capital and gain a measure of independence from the railroads. There is certainly support for the position that REA needs to free "itself from the

control and domination previously exercised by its railroad shareholders over its operations." 80 ICC Ann. Rep., p. 22 (1966). The strong ties between REA and the railroads led to the operation of REA in the railroads' own interests, without regard to their coincidence with REA's best interests or the public interest. Prior to a 1959 agreement, generated in large part by REA losses, see *Express Contract, 1959, supra,* 308 I. C. C., at 546, REA was required to distribute traffic among carriers on the basis of existing traffic patterns, and the consent of rail carriers operating between given points was required before REA could utilize carriers other than railroads between those points. Changes in these limitations have enabled REA to finance some improvements and steadily to increase its corporate surplus. Study of REA Express, Staff Liaison Group V–C, CAB, FMC & ICC 24–26 (1965). But it does not follow that REA will be any better off in the long run, or that the public interest will be advanced, if its ownership shifts in part or entirely to Greyhound.

While the history of REA does not in itself provide a blueprint for its future, it does "afford a basis for considering the lawfulness of REA's status and activities, and the economic desirability of its apparent direction of growth." Study, *op. cit. supra,* at 3. That history indicates that there may be some relationship between REA's depressed state and its close ties with railroads. Before acting on this premise, however, the ICC must at least consider the question whether a given course of action will in fact alleviate the problem. If railroad ownership operated in the past to deprive REA of an opportunity to prosper and serve the public interest, it is not inconceivable that partial ownership by Greyhound will have the same result. Greyhound, presumably, is no less likely to act in its own interest. If the railroads operated REA, as appellees contend, to minimize competition for

transport generally between REA and the railroads, and for express between the railroads themselves and between railroads and other modes of transport, how will partial or complete ownership by Greyhound change things? Even if only partial ownership results, may Greyhound and the railroad owners operate REA so as to minimize competition between REA and themselves for transport generally? What effect, for example, would partial ownership by Greyhound have upon the recent efforts of REA to add to its express operations the hauling of larger and more varied volumes of freight, efforts which bring it into competition with Greyhound and other bus lines as well as with truck lines and freight forwarders? Moreover, what assurance is there that REA will not tend to route shipments via Greyhound in preference to more efficient or economical carriers or modes, just as the railroads bound REA to use their lines as opposed to other modes, absent their approval? We assume that REA needs funds and would be better off more independent from the railroads, but before the ICC can use these reasons to justify a diversification of ownership it must at least consider whether the specific action approved may operate to the detriment of REA or the public interest.

There is, finally, little merit to the Government's argument that deferral of the anticompetitive issues is strongly supported by considerations of administrative convenience. The only circumstance in which the anticompetitive issues may be eliminated from the case is if Greyhound, thwarted at the end of the 60 days in its plans to control REA, were to dispose of its 20% interest. But the ICC can hardly justify deferral of consideration of the consequences of a transaction on the possibility that the problems its approval creates may shortly vanish by a reversal of the transaction itself. Of course, if, as appellees claim, it is most likely that Greyhound will

acquire no further stock, then consideration of those consequences now would not be wasted effort. And the argument of wasted effort is still less persuasive if appellees are proved wrong and Greyhound does acquire more stock. For the most significant question which the ICC must face is whether it is in the public interest that REA continue to be owned by other transport companies, and specifically by Greyhound. Once this question is resolved as to the 20% stock acquisition, and the consequences of that acquisition are fully weighed, the ICC's task in any subsequent proceeding if Greyhound enlarges its stock interest will be far more manageable.

We therefore conclude that, although the possibility that Greyhound may not increase its holdings within the 60-day period may justify deferral of resolution of the control issue, it does not justify delay in consideration of the anticompetitive effects of the 20% transaction. The Government was correct in its position before the ICC that this record placed "before the Commission serious questions under section 7 of the Clayton Act," requiring a hearing.

The judgment of the District Court is reversed with direction to enter a new judgment remanding the case to the Interstate Commerce Commission for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE WHITE, concurring in part and dissenting in part.

I agree with most of the Court's opinion, with its holding that competitive factors must be considered in a § 20a proceeding and with its ruling that a hearing should have been held by the Commission in this case before approving the issuance of the securities by Railway Express Agency, Inc., to Greyhound Corporation.

But I am doubtful about those parts of the Court's opinion which indicate that although the public interest requires the consideration of competitive factors in connection with the issuance of stock under § 20a, the public interest also demands that if a lessening of competition is found or threatened within the meaning of § 7 of the Clayton Act, the issuance must be disapproved. Under § 5 of the Interstate Commerce Act, competitive factors must also be considered in determining the public interest, but there a balanced view of the public interest permits the approval of a merger or consolidation despite any actual or probable competitive impact. Mergers which would violate § 7 are thus permissible under § 5 if found in the public interest but only those acquisitions of stock which are not suspect under § 7 of the Clayton Act are permissible under § 20a.

In the last analysis the Court rests this rather odd distinction on the Act itself—that is, Congress is said to have intended this very result because it provided in § 5 (11) that the approval of a transaction under § 5 relieves the parties from antitrust liability and did not so provide in connection with § 20a transactions. I do not think, however, that this ends the matter, and I find unconvincing the speculative reasons the Court gives for suggesting that Congress intended any such result.

Much more persuasive to me is the approach of *Pan American World Airways* v. *United States*, 371 U. S. 296. That case involved the Civil Aeronautics Act of 1938, 52 Stat. 973, re-enacted as the Federal Aviation Act of 1958, 72 Stat. 731, 49 U. S. C. § 1301 *et seq.*, which provided antitrust immunity for transactions approved by the Civil Aeronautics Board under §§ 408, 409, and 412. The course of conduct attacked by the United States under § 1 of the Sherman Act in *Pan American* was not, however, within any of these sections. The Court, nevertheless, held that the conduct was clearly of the kind

specifically committed to regulation by the Board under other sections of the Act and was unassailable in an independent civil action brought by the United States under § 1 of the Sherman Act.

In the case before us, § 20a (2) provides that it shall be unlawful for any carrier to issue securities unless approved by the Commission after finding that the issuance:

> "(a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose."

The Commission may grant an application under § 20a in whole or in part with such modifications and on such terms and conditions as the Commission may deem appropriate, and it may from time to time make such supplemental orders with respect to the transaction as it may deem necessary. § 20a (3). Moreover, it is expressly provided that "[t]he jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein." § 20a (7).

Having these powers conferred upon it in the name of the public interest, the Commission may, in my view, approve the issuance of stock by a carrier if it deems the public interest requires it even though there may be a probable lessening of competition which otherwise would violate § 7 of the Clayton Act. This seems to be precisely what Congress intended by expressly providing in § 7 of the Clayton Act itself that "Nothing contained in this

section shall apply to transactions duly consummated pursuant to authority given by the . . . Interstate Commerce Commission . . . under any statutory provision vesting such power in such Commission . . . ." 15 U. S. C. § 18.

It makes very little sense to me to hold that a stock acquisition involving control may be approved if the public interest requires it, despite any actual anti-competitive impact, and yet to forbid the approval of an acquisition which falls short of control but which "may" injure competition within the meaning of the Clayton Act.

Thus while I agree that a hearing should be required before the Commission approves the issuance of the securities in this case, I would make it clear that competitive considerations are only some of the factors to be weighed in reaching a decision concerning the public interest, much as the Court has viewed the proceedings under § 5. *McLean Trucking Co.* v. *United States*, 321 U. S. 67. At the very least I would not now decide that the Commission is powerless to approve the issuance of securities under § 20a if it determines that the impact on competition would otherwise be barred by the Clayton Act.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

This case involves a proposed stock issue by appellee Railway Express Agency, Inc. (REA), of 500,000 shares of previously authorized but unissued shares of its common stock. Under § 20a (2) of the Interstate Commerce Act, 49 U. S. C. § 20a (2), this type of stock transaction must be authorized by the Interstate Commerce Commission, which must determine whether the issue is "for some lawful object within . . . [the applicant's] corporate purposes, and compatible with the public interest . . . ."

Under the proposed transactions REA contracted to sell this block of shares for $10,000,000 to the Greyhound Corporation, which would then offer to purchase within a 60-day period an additional 1,000,000 shares from existing stockholders, all of whom are railroads and all of whom hold rights of first refusal as to the sale of existing REA shares. Some of these railroad-stockholders have been opposed to Greyhound's entry into REA and have expressed their intention to exercise their pre-emptive rights. It is undisputed that if Greyhound nevertheless succeeds in purchasing these additional shares it would be in a position to exercise a substantial degree of control over REA, cf. *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 145, and that such control would require the approval of the ICC under § 5 (2) of the Interstate Commerce Act, 49 U. S. C. § 5 (2). It was also alleged by the United States as an intervenor before the ICC that the possible exercise of control by Greyhound over REA and an anticipated co-ordination of certain services by the two carriers [1] raised serious antitrust questions under § 7 of the Clayton Act, 15 U. S. C. § 18, which the ICC is bound to enforce as to regulated carriers, Clayton Act § 11, 15 U. S. C. § 21.

The Interstate Commerce Commission did not deal with the substance of these "control" and "antitrust" issues. It found that REA "urgently needs the proceeds of $10,000,000 . . . ," [2] and that it was not necessary, given

[1] The Commission found that REA had agreed "to consider seriously and work toward a long-term agreement between applicant [REA] and Greyhound to consolidate operating functions and facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies, improve service and increase public receptivity and patronage . . . ." A "Memorandum of Understanding" between an official of each of the two companies contained some suggested methods for achieving these goals.

[2] The ICC's order dealing with the legitimacy of this transaction said: ". . . applicant urgently needs the proceeds of $10,000,000 in its

the uncertainty as to the future relationship of Greyhound and REA, to deal with the control issue at that time. The Commission noted specifically that "if in the future the acquisition of control or power to control, or other matter or transaction to which section 5 of the act applies, becomes imminent or apparent, the opportunity will be available for all interested persons to interpose their opposition . . . ."

On review, a three-judge District Court for the District of Colorado sustained the Commission's order, 255 F. Supp. 704. It read the ICC's decision, as does this Court, as saying only "that in the circumstances presented the public interest requires the issuance of the stock and that determination of the competitive effects will be appropriate for consideration after the chain of events started by the stock issuance is ascertainable rather than conjectural." *Id.*, at 709. The District Court then held that "[i]n the circumstances it is not our prerogative to interfere with what we deem to be a reasonable exercise by the Commission of its discretionary powers." *Id.*, at 710.

I would affirm this judgment of the District Court, and therefore must dissent from today's decision. The Court holds that "the ICC is required, as a general rule, under its duty to determine that the proposed transaction is in the 'public interest' and for a 'lawful object,' to consider the control and anticompetitive consequences before approving stock issuances under § 20a (2)." *Ante*, p. 498. The Court notes, however, that "[t]his does not

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program of acquiring and modernizing terminals and equipment in order to keep operating costs at a reasonable level; that it is handicapped in borrowing to finance capital improvements because of its unfavorable debt-equity ratio; that the proposed issue will improve its ratio as well as reduce to some extent the amount of future borrowing required; that the price of $20 per share is fair and reasonable; and that the expenses of the issue are estimated at $15,000 . . . ."

mean the ICC must grant a hearing in every case, or that it may never defer consideration of issues which arise when special circumstances are present," *ibid.*, but concludes that while it was not an abuse of discretion to defer consideration of the "control" question raised by the intervenors, it was improper to refuse to deal with the "anticompetitive" issues at this stage. I believe that this decision misapplies the relevant statutes and seriously impedes sound administrative practice.

I.

Section 20a (2) of the Interstate Commerce Act is concerned with new stock issues. Congress' dominant concern was "to maintain a sound structure for the . . . support of railroad credit," 1 Sharfman, The Interstate Commerce Commission 190 (1931),[3] and nothing in the legislative background of the section indicates that the words "for some lawful object within its corporate purposes, and compatible with the public interest" were intended to encompass issues of antitrust law. Of course the phrase "the public interest" is broad, and in the context of other legislation comparable terms

[3] The "public interest" of concern to Congress was the problem of watered stock. See, *e. g.*, statement of Congressman Rayburn: ". . . if we write into the law of the land a statute to the effect that before a railroad can issue new securities, before it can put them on the market, it must come before the properly constituted governmental agency, lay the full facts of its financial situation before that body, tell that body what it intends to do with the money derived from the sale of the issue of securities, and after it has received the approval of that regulating body and it goes out and puts those securities on the market, then the Interstate Commerce Commission by this law is empowered at any time to call it to account and have it tell to that regulating body that it expended the money, the proceeds of the sale of securities, for the purposes for which it had made the application." 58 Cong. Rec. 8376 (1919). See also statement of Congressman Esch, *id.*, at 8317–8318. See generally MacVeagh, The Transportation Act of 1920, at 486–492 (1923).

have been held to embrace antitrust matters. *E. g.*, Federal Communications Act, § 307, 48 Stat. 1083, 47 U. S. C. § 307, as construed in *FCC* v. *RCA Communications, Inc.*, 346 U. S. 86. But the mere inclusion of such language in this instance is not the end of our inquiry, for § 20a must be read in its entirety and interpreted in conjunction with other sections of the Act.

In contrast to § 20a, which by its detailed and explicit terms deals only with the problem of fiscal responsibility,[4] § 5 of the Act, enacted at the same time,[5] deals specifically with problems of "control." Indeed, the standards laid out in § 5 are directly relevant to the various factual issues hypothesized by the Court in Part IV of its opinion. Section 5 does not deal solely with transfers of shares, but with any lease or contract between two carriers for the operation of their properties, §§ 5 (2)(a)(i), 5 (4); see

[4] Section 20a (2) reads in its entirety: "It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed 'securities') or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose."

[5] Both sections were parts of the Transportation Act of 1920, 41 Stat. 480, 494.

Gilbertville Trucking Co. v. *United States,* 371 U. S. 115, 125. It would thus appear that any type of agreement between Greyhound and REA for the integration of their operations would—with or without the sale of shares—fall within the purview of § 5.

Section 5 not only deals explicitly with problems of control, but it establishes the public interest criteria which the ICC is bound to use in making that type of inquiry. For example, the Commission must consider "(1) The effect of the proposed transaction upon adequate transportation service to the public; . . . (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected." § 5 (2) (c). This Court has recognized that standards of market control in the transportation industry are different from those governing other business transactions: the ICC must take account of antitrust policy in judging the control questions under § 5, *McLean Trucking Co.* v. *United States,* 321 U. S. 67, but this interest is simply one of the relevant criteria, and if on balance the Commission finds a proposed undertaking to be in the public interest the statute authorizes a grant of antitrust immunity to the transaction. § 5 (11); *Seaboard Air Line R. Co.* v. *United States,* 382 U. S. 154; *Minneapolis & St. L. R. Co.* v. *United States,* 361 U. S. 173; *McLean Trucking Co.* v. *United States, supra.* Section 5 thus covers fully the problems of control; likewise, the antitrust issues are dealt with specifically in § 11 of the Clayton Act, which authorizes the ICC to enforce § 7 of that Act, forbidding the acquisition of stock the effect of which "may be substantially to lessen competition, or to tend to create a monopoly." Hence these sections, and not § 20a, are the substantive provisions governing the Commission's jurisdiction in respect to the anticompetitive aspects of this case.

For procedural reasons, too, § 20a seems inappropriate as a vehicle to replace or augment § 5 of the Interstate Commerce Act and §§ 7 and 11 of the Clayton Act. When a carrier applies for authorization to issue stock, the Commission must give notice to the various States in which the carrier operates so that relevant state regulatory agencies, which also supervise the finances and corporate structure of these companies, may raise objections to the proposed transaction. The Commission need not, however, hold a hearing before approving the transaction. § 20a (6). In contrast, when the ICC deals with problems of control under § 5, it is bound not only to notify the various state authorities but also to "afford reasonable opportunity for interested parties to be heard." § 5 (2)(b). And § 11 of the Clayton Act requires the Commission to notify the Attorney General if it believes that any carrier is violating § 7, and the Attorney General has the statutory right to intervene in the mandatory hearing on the question.

Given the complexities of control and antitrust problems in the transportation field, and given the specific and detailed provisions of the statute in § 5, and in § 11 of the Clayton Act, devoted particularly to them, it seems to me quite evident that the sounder view of the statutory scheme is to regard § 20a as being limited to matters of corporate financing and § 5 and § 7 as being the source of the Commission's authority and duty to deal with these other matters.

None of the Commission cases cited by the Court in support of its position that § 20a was envisioned as also encompassing control and antitrust considerations is apposite. *Columbia Terminals Co.—Issuance of Notes*, 40 M. C. C. 288, dealt, as the Court notes, with § 10 of the Clayton Act, 15 U. S. C. § 20, which specifically requires common carriers in certain situations to sell securities "by competitive bidding under regulations to be prescribed by

rule or otherwise by the Interstate Commerce Commission." The ICC merely held that this statute had not been repealed by § 20a. The general language cited by the Court from *Stock of New Jersey, I. & I. R. Co.*, 94 I. C. C. 727, was written in a case in which the issue was whether the applicant railroad could pay an indebtedness to its sole stockholder, another railroad, through a distribution of stock as a dividend. The ICC held this method of financing acceptable; antitrust considerations were in no way involved.

The third ICC decision cited by the Court, *Chesapeake & O. R. Co. Purchase*, 271 I. C. C. 5, would seem, if anything, inconsistent with its view of § 20a. There the Commission was requested to approve an interlocking directorate, which is forbidden unless authorized by the Commission pursuant to § 20a (12) of the Interstate Commerce Act, 49 U. S. C. § 20a (12). In making its decision the Commission did not incorporate § 5 control standards into § 20a (12). Quite the contrary, it noted that "[t]he policy of the Congress as to consolidations, mergers, and other forms of corporate unification and association is now to be found in the provisions of section 5," *id.*, at 12; that no application under § 5 (2) had been filed; and that "[i]t follows that the evidence pertaining to control of the New York Central or ultimate unification of the two carriers is irrelevant to the principal issues before us, and may not be considered in disposing of those issues." *Ibid.* The Commission then determined, under its established standards for judging the acceptability of an interlocking directorate, *id.*, at 18, that such an authorization would be improper, but observed that "[i]f the applicants are firmly of the opinion that the proposed association will result in the benefits to the carriers and to the public which they contend we should find on the showing that they have made in this proceeding, there is no reason why they should not

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file an application for some form of association under section 5 (2) of the act." *Id.*, at 41–42.

The lack of authority for the Court's view of § 20a is not limited to administrative decisions. In the complex *Alleghany Corp.* litigation, summarized by the Court, *ante*, pp. 497–498, this Court sustained the ICC's determination that it could act upon a § 20a application without involving itself in difficult issues of intercorporate control as the District Court had ordered. The protracted and tangled character of that litigation, until resolved in the interests of simplicity by this Court's affirmance of the ICC's approach, should be a warning of the unfortunate consequences that may follow judicial requirements complicating and proliferating administrative hearings in unfamiliar fields; this is especially so where there are, as here, numerous parties some of whom have a strong interest in achieving delay.

II.

Although not accepting the reading of the Act which I have urged, the Court nonetheless appears to recognize that the issue of "control" *is* a separate one from that of financial regularity, and one that can appropriately be dealt with in a separate and subsequent proceeding. Since the Court also acknowledges, as it must, that at this later hearing REA and Greyhound may request a § 5 (11) exemption, and thus bring into play all the standards of § 5, I find the Court's insistence that this issue falls within the purview of § 20a rather than § 5 essentially an academic one. The ICC will still be able to conduct its hearings just as it wished to do here, except that its subsequent "§ 5 proceeding" will henceforth be labeled a "§ 20a and § 5 proceeding."

Given the Court's recognition that the ICC has discretion to postpone the "control" determination, I find

it difficult to accept its argument that "antitrust" factors may not similarly be postponed.

It should be recalled that the only matter raised in this application is REA's desire to issue 500,000 shares of its stock to "a non-railroad purchaser," which concededly would bring to the issuer capital funds required for investment purposes. Under the proposed transaction, after Greyhound purchases these shares it will extend an offer to purchase within 60 days an additional 1,000,000 shares, as to which other shareholders hold rights of first refusal. All parties are in agreement that control and antitrust problems will be raised if Greyhound is ultimately successful in effecting these additional purchases. The only question is whether the Commission can leave these questions for a later determination. Because of the uncertainty as to the outcome of the further stock purchase offer, the Court agrees that postponement of the control issue was proper. But this uncertainty is equally crucial to the Clayton Act issues. The likelihood of a Clayton Act violation will of course be increased if Greyhound obtains these additional shares and is in a position to control, and to consolidate operations with, REA. On the other hand, if the shares are bought by some of the appellants whose interests appear to be adverse to Greyhound, the possibility of substantial harm to competition will be minimal. The core of the Clayton Act question, then, is inexorably tied to the control question, and the Court does not deny that these problems overlap. In these circumstances I find it impossible to follow the Court in holding, on the one hand, that the control hearing was permissibly postponed, but, on the other, that the ICC abused its discretion in similarly deferring any Clayton Act hearing.

To require such a proliferation of hearings as to a single transaction—one involving a straightforward busi-

ness transaction negotiated in terms of existing market conditions and the existing needs of the parties—is bound to obstruct the smooth workings of the administrative process. The penetrating observations of Professor Jaffe seem to me especially pertinent in this situation:

> "I gather the impression that some judges who quite insistently display a 'correct' attitude of deference on substantive issues apply a different standard to procedural decisions: they do not hesitate to protract and to complicate the administrative process. Their premise may be that the considerations that dictate deference to substantive decisions are inapplicable to procedural ones. This is only partly true. . . . Since procedural decisions should be made to serve the substantive task, it follows that expertness in matters of substance are relevant to the exercise of procedural discretion.
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> ". . . [An agency] must ration its limited resources of time, energy and money. It must devote them to those exigent and soluble problems which are most nearly related to its core responsibility. What problems *are* most exigent, how they can best be solved . . . are questions the solution to which peculiarly demands a feeling for the whole situation. . . . If a court is not as well fitted to solve substantive problems as the agency, if on this level intermittent, disjected criticism disperses accountability, how much more is this true where the deployment of forces is involved." Jaffe, Judicial Control of Administrative Action 566–567 (1965).

The courts have traditionally permitted busy agencies substantial flexibility in formulating their internal procedures, and encouraged their efforts to eliminate duplicative action and repetitive hearings. See, *e. g., Chicago & N. W. R. Co.* v. *Atchison, T. & S. F. R. Co., ante,* pp.

341–343; *Federal Power Comm'n* v. *Tennessee Gas Co.*, 371 U. S. 145, 153–155, where the Court approved a "two-step procedure" as "not only entirely appropriate but in the best tradition of effective administrative practice"; *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 534–536; *Baltimore & O. R. Co.* v. *United States*, 386 U. S. 372, 459 (dissenting opinion); cf. *Fahey* v. *Mallonee*, 332 U. S. 245; *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 152–154; *United States* v. *Illinois Central R. Co.*, 291 U. S. 457.

The allowance of such flexibility, and the exercise of prudence by the courts, is especially appropriate where, as here, the issue is not *whether* to hold a hearing but *when* to do so, and where there has been no showing that harm would come from deferring consideration of the antitrust issues. This is not a case in which a merger is about to be consummated, and in which it might be feared that the integration of two businesses will be impossible to "unscramble" at some future time. Compare *FTC* v. *Dean Foods Co.*, 384 U. S. 597. These issues concern, as the Court's parade of speculative examples indicates, *ante*, pp. 505–506, the implications of a possible future co-ordination of some carrier services between REA and Greyhound. But these matters will only crystallize for purposes of legal analysis when it is ascertained (1) what type of control, if any, Greyhound will have over REA; and (2) what type of co-ordinated activities are planned. None of these issues has been prejudged, and provisional relief can be granted by the Commission, if necessary, §§ 5 (2), (7), (9); cf. *Gilbertville Trucking Co.* v. *United States*, 371 U. S. 115, 129–131. The district courts likewise have authority to grant injunctive relief on application of the Commission. § 5 (8).

In these circumstances I do not believe it was an abuse of discretion for the ICC to authorize the issuance

of stock, postponing consideration of the control and antitrust issues until the transaction was completed some 60 days later. It is regrettable that the Court's preoccupation with the future antitrust possibilities of this situation, fully acknowledged by all but still entirely speculative, should have led it to interfere, so unnecessarily, with the obviously sensible course of procedure adopted by the Commission.

I would affirm the judgment of the District Court.

Syllabus.

CAMARA *v.* MUNICIPAL COURT OF THE CITY AND COUNTY OF SAN FRANCISCO.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT.

No. 92. Argued February 15, 1967.—Decided June 5, 1967.

Appellant was charged with violating the San Francisco Housing Code for refusing, after three efforts by city housing inspectors to secure his consent, to allow a warrantless inspection of the ground-floor quarters which he leased and residential use of which allegedly violated the apartment building's occupancy permit. Claiming the inspection ordinance unconstitutional for failure to require a warrant for inspections, appellant while awaiting trial sued in a State Superior Court for a writ of prohibition, which the court denied. Relying on *Frank* v. *Maryland*, 359 U. S. 360, and similar cases, the District Court of Appeal affirmed, holding that the ordinance did not violate the Fourth Amendment. The State Supreme Court denied a petition for hearing. *Held:*

1. The Fourth Amendment bars prosecution of a person who has refused to permit a warrantless code-enforcement inspection of his personal residence. *Frank* v. *Maryland, supra, pro tanto* overruled. Pp. 528–534.

(a) The basic purpose of the Fourth Amendment, which is enforceable against the States through the Fourteenth, through its prohibition of "unreasonable" searches and seizures is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. P. 528.

(b) With certain carefully defined exceptions, an unconsented warrantless search of private property is "unreasonable." Pp. 528–529.

(c) Contrary to the assumption of *Frank* v. *Maryland, supra,* Fourth Amendment interests are not merely "peripheral" where municipal fire, health, and housing inspection programs are involved whose purpose is to determine the existence of physical conditions not complying with local ordinances. Those programs, moreover, are enforceable by criminal process, as is refusal to allow an inspection. Pp. 529–531.

(d) Warrantless administrative searches cannot be justified on the grounds that they make minimal demands on occupants;

that warrants in such cases are unfeasible; or that area inspection programs could not function under reasonable search-warrant requirements. Pp. 531–533.

2. Probable cause upon the basis of which warrants are to be issued for area code-enforcement inspections is not dependent on the inspector's belief that a particular dwelling violates the code but on the reasonableness of the enforcement agency's appraisal of conditions in the area as a whole. The standards to guide the magistrate in the issuance of such search warrants will necessarily vary with the municipal program being enforced. Pp. 534–539.

3. Search warrants which are required in nonemergency situations should normally be sought only after entry is refused. Pp. 539–540.

4. In the nonemergency situation here, appellant had a right to insist that the inspectors obtain a search warrant. P. 540.

237 Cal. App. 2d 128, 46 Cal. Rptr. 585, vacated and remanded.

Marshall W. Krause argued the cause for appellant. With him on the briefs was *Donald M. Cahen.*

Albert W. Harris, Jr., Assistant Attorney General of California, argued the cause for appellee. With him on the brief were *Thomas C. Lynch*, Attorney General, and *Gloria F. DeHart*, Deputy Attorney General.

Leonard J. Kerpelman filed a brief for Homeowners in Opposition to Housing Authoritarianism, as *amicus curiae*, urging reversal.

Briefs of *amici curiae*, urging affirmance, were filed by *Thomas M. O'Connor, John W. Sholenberger, Roger Arnebergh, Barnett I. Shur, Alexander G. Brown, David Stahl* and *Robert E. Michalski* for the Member Municipalities of the National Institute of Municipal Law Officers, and by *Elliot L. Richardson*, Attorney General, *Willie J. Davis*, Assistant Attorney General, *Edward T. Martin*, Deputy Attorney General, *Max Rosenblatt, Lewis H. Weinstein* and *Loyd M. Starrett* for the Commonwealth of Massachusetts et al.

MR. JUSTICE WHITE delivered the opinion of the Court.

In *Frank* v. *Maryland*, 359 U. S. 360, this Court upheld, by a five-to-four vote, a state court conviction of a homeowner who refused to permit a municipal health inspector to enter and inspect his premises without a search warrant. In *Eaton* v. *Price*, 364 U. S. 263, a similar conviction was affirmed by an equally divided Court. Since those closely divided decisions, more intensive efforts at all levels of government to contain and eliminate urban blight have led to increasing use of such inspection techniques, while numerous decisions of this Court have more fully defined the Fourth Amendment's effect on state and municipal action. *E. g., Mapp* v. *Ohio*, 367 U. S. 643; *Ker* v. *California*, 374 U. S. 23. In view of the growing nationwide importance of the problem, we noted probable jurisdiction in this case and in *See* v. *City of Seattle*, *post*, p. 541, to re-examine whether administrative inspection programs, as presently authorized and conducted, violate Fourth Amendment rights as those rights are enforced against the States through the Fourteenth Amendment. 385 U. S. 808.

Appellant brought this action in a California Superior Court alleging that he was awaiting trial on a criminal charge of violating the San Francisco Housing Code by refusing to permit a warrantless inspection of his residence, and that a writ of prohibition should issue to the criminal court because the ordinance authorizing such inspections is unconstitutional on its face. The Superior Court denied the writ, the District Court of Appeal affirmed, and the Supreme Court of California denied a petition for hearing. Appellant properly raised and had considered by the California courts the federal constitutional questions he now presents to this Court.

Though there were no judicial findings of fact in this prohibition proceeding, we shall set forth the parties' factual allegations. On November 6, 1963, an inspector

of the Division of Housing Inspection of the San Francisco Department of Public Health entered an apartment building to make a routine annual inspection for possible violations of the city's Housing Code.[1] The building's manager informed the inspector that appellant, lessee of the ground floor, was using the rear of his leasehold as a personal residence. Claiming that the building's occupancy permit did not allow residential use of the ground floor, the inspector confronted appellant and demanded that he permit an inspection of the premises. Appellant refused to allow the inspection because the inspector lacked a search warrant.

The inspector returned on November 8, again without a warrant, and appellant again refused to allow an inspection. A citation was then mailed ordering appellant to appear at the district attorney's office. When appellant failed to appear, two inspectors returned to his apartment on November 22. They informed appellant that he was required by law to permit an inspection under § 503 of the Housing Code:

> "Sec. 503 RIGHT TO ENTER BUILDING. Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code."

[1] The inspection was conducted pursuant to § 86 (3) of the San Francisco Municipal Code, which provides that apartment house operators shall pay an annual license fee in part to defray the cost of periodic inspections of their buildings. The inspections are to be made by the Bureau of Housing Inspection "at least once a year and as often thereafter as may be deemed necessary." The permit of occupancy, which prescribes the apartment units which a building may contain, is not issued until the license is obtained.

Appellant nevertheless refused the inspectors access to his apartment without a search warrant. Thereafter, a complaint was filed charging him with refusing to permit a lawful inspection in violation of § 507 of the Code.[2] Appellant was arrested on December 2 and released on bail. When his demurrer to the criminal complaint was denied, appellant filed this petition for a writ of prohibition.

Appellant has argued throughout this litigation that § 503 is contrary to the Fourth and Fourteenth Amendments in that it authorizes municipal officials to enter a private dwelling without a search warrant and without probable cause to believe that a violation of the Housing Code exists therein. Consequently, appellant contends, he may not be prosecuted under § 507 for refusing to permit an inspection unconstitutionally authorized by § 503. Relying on *Frank* v. *Maryland, Eaton* v. *Price,* and decisions in other States,[3] the District

[2] "Sec. 507 PENALTY FOR VIOLATION. Any person, the owner or his authorized agent who violates, disobeys, omits, neglects, or refuses to comply with, or who resists or opposes the execution of any of the provisions of this Code, or any order of the Superintendent, the Director of Public Works, or the Director of Public Health made pursuant to this Code, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars ($500.00), or by imprisonment, not exceeding six (6) months or by both such fine and imprisonment, unless otherwise provided in this Code, and shall be deemed guilty of a separate offense for every day such violation, disobedience, omission, neglect or refusal shall continue."

[3] *Givner* v. *State,* 210 Md. 484, 124 A. 2d 764 (1956); *City of St. Louis* v. *Evans,* 337 S. W. 2d 948 (Mo. 1960); *State ex rel. Eaton* v. *Price,* 168 Ohio St. 123, 151 N. E. 2d 523 (1958), aff'd by an equally divided Court, 364 U. S. 263 (1960). See also *State* v. *Rees,* 258 Iowa 813, 139 N. W. 2d 406 (1966); *Commonwealth* v. *Hadley,* 351 Mass. 439, 222 N. E. 2d 681 (1966), appeal docketed Jan. 5, 1967, No. 1179, Misc., O. T. 1966; *People* v. *Laverne,* 14 N. Y. 2d 304, 200 N. E. 2d 441 (1964).

Court of Appeal held that § 503 does not violate Fourth Amendment rights because it "is part of a regulatory scheme which is essentially civil rather than criminal in nature, inasmuch as that section creates a right of inspection which is limited in scope and may not be exercised under unreasonable conditions." Having concluded that *Frank* v. *Maryland,* to the extent that it sanctioned such warrantless inspections, must be overruled, we reverse.

I.

The Fourth Amendment provides that, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. The Fourth Amendment thus gives concrete expression to a right of the people which "is basic to a free society." *Wolf* v. *Colorado,* 338 U. S. 25, 27. As such, the Fourth Amendment is enforceable against the States through the Fourteenth Amendment. *Ker* v. *California,* 374 U. S. 23, 30.

Though there has been general agreement as to the fundamental purpose of the Fourth Amendment, translation of the abstract prohibition against "unreasonable searches and seizures" into workable guidelines for the decision of particular cases is a difficult task which has for many years divided the members of this Court. Nevertheless, one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper con-

sent is "unreasonable" unless it has been authorized by a valid search warrant. See, *e. g., Stoner* v. *California,* 376 U. S. 483; *United States* v. *Jeffers,* 342 U. S. 48; *McDonald* v. *United States,* 335 U. S. 451; *Agnello* v. *United States,* 269 U. S. 20. As the Court explained in *Johnson* v. *United States,* 333 U. S. 10, 14:

> "The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."

In *Frank* v. *Maryland,* this Court upheld the conviction of one who refused to permit a warrantless inspection of private premises for the purposes of locating and abating a suspected public nuisance. Although *Frank* can arguably be distinguished from this case on its facts,[4] the *Frank* opinion has generally been interpreted as carving out an additional exception to the rule that warrantless searches are unreasonable under the Fourth Amendment. See *Eaton* v. *Price, supra.* The District Court of Appeal so interpreted *Frank* in this case, and that ruling is the core of appellant's challenge here. We proceed to a re-examination of the factors which

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[4] In *Frank,* the Baltimore ordinance required that the health inspector "have cause to suspect that a nuisance exists in any house, cellar or enclosure" before he could demand entry without a warrant, a requirement obviously met in *Frank* because the inspector observed extreme structural decay and a pile of rodent feces on the appellant's premises. Section 503 of the San Francisco Housing Code has no such "cause" requirement, but neither did the Ohio ordinance at issue in *Eaton* v. *Price,* a case which four Justices thought was controlled by *Frank.* 364 U. S., at 264, 265, n. 2 (opinion of MR. JUSTICE BRENNAN).

persuaded the *Frank* majority to adopt this construction of the Fourth Amendment's prohibition against unreasonable searches.

To the *Frank* majority, municipal fire, health, and housing inspection programs "touch at most upon the periphery of the important interests safeguarded by the Fourteenth Amendment's protection against official intrusion," 359 U. S., at 367, because the inspections are merely to determine whether physical conditions exist which do not comply with minimum standards prescribed in local regulatory ordinances. Since the inspector does not ask that the property owner open his doors to a search for "evidence of criminal action" which may be used to secure the owner's criminal conviction, historic interests of "self-protection" jointly protected by the Fourth and Fifth Amendments [5] are said not to be involved, but only the less intense "right to be secure from intrusion into personal privacy." *Id.*, at 365.

We may agree that a routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime. For this reason alone, *Frank* differed from the great bulk of Fourth Amendment cases which have been considered by this Court. But we cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely "peripheral." It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.[6] For instance, even the most law-abiding citi-

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[5] See *Boyd* v. *United States*, 116 U. S. 616. Compare *Schmerber* v. *California*, 384 U. S. 757, 766–772.

[6] See *Abel* v. *United States*, 362 U. S. 217, 254–256 (MR. JUSTICE BRENNAN, dissenting); *District of Columbia* v. *Little*, 85 U. S. App. D. C. 242, 178 F. 2d 13, aff'd, 339 U. S. 1.

zen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority, for the possibility of criminal entry under the guise of official sanction is a serious threat to personal and family security. And even accepting *Frank*'s rather remarkable premise, inspections of the kind we are here considering do in fact jeopardize "self-protection" interests of the property owner. Like most regulatory laws, fire, health, and housing codes are enforced by criminal processes. In some cities, discovery of a violation by the inspector leads to a criminal complaint.[7] Even in cities where discovery of a violation produces only an administrative compliance order,[8] refusal to comply is a criminal offense, and the fact of compliance is verified by a second inspection, again without a warrant.[9] Finally, as, this case demonstrates, refusal to permit an inspection is itself a crime, punishable by fine or even by jail sentence.

The *Frank* majority suggested, and appellee reasserts, two other justifications for permitting administrative health and safety inspections without a warrant. First, it is argued that these inspections are "designed to make the least possible demand on the individual occupant." 359 U. S., at 367. The ordinances authorizing inspections are hedged with safeguards, and at any rate the inspector's particular decision to enter must comply with the constitutional standard of reasonableness even if he may enter without a warrant.[10] In addition, the argument

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[7] See New York, N. Y., Administrative Code § D26–8.0 (1964).

[8] See Washington, D. C., Housing Regulations § 2104.

[9] This is the more prevalent enforcement procedure. See Note, Enforcement of Municipal Housing Codes, 78 Harv. L. Rev. 801, 813–816.

[10] The San Francisco Code requires that the inspector display proper credentials, that he inspect "at reasonable times," and that

proceeds, the warrant process could not function effectively in this field. The decision to inspect an entire municipal area is based upon legislative or administrative assessment of broad factors such as the area's age and condition. Unless the magistrate is to review such policy matters, he must issue a "rubber stamp" warrant which provides no protection at all to the property owner.

In our opinion, these arguments unduly discount the purposes behind the warrant machinery contemplated by the Fourth Amendment. Under the present system, when the inspector demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization. These are questions which may be reviewed by a neutral magistrate without any reassessment of the basic agency decision to canvass an area. Yet, only by refusing entry and risking a criminal conviction can the occupant at present challenge the inspector's decision to search. And even if the occupant possesses sufficient fortitude to take this risk, as appellant did here, he may never learn any more about the reason for the inspection than that the law generally allows housing inspectors to gain entry. The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to

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he not obtain entry by force, at least when there is no emergency. The Baltimore ordinance in *Frank* required that the inspector "have cause to suspect that a nuisance exists." Some cities notify residents in advance, by mail or posted notice, of impending area inspections. State courts upholding these inspections without warrants have imposed a general reasonableness requirement. See cases cited, n. 3, *supra*.

search. See cases cited, p. 529, *supra*. We simply cannot say that the protections provided by the warrant procedure are not needed in this context; broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of a criminal penalty.

The final justification suggested for warrantless administrative searches is that the public interest demands such a rule: it is vigorously argued that the health and safety of entire urban populations is dependent upon enforcement of minimum fire, housing, and sanitation standards, and that the only effective means of enforcing such codes is by routine systematized inspection of all physical structures. Of course, in applying any reasonableness standard, including one of constitutional dimension, an argument that the public interest demands a particular rule must receive careful consideration. But we think this argument misses the mark. The question is not, at this stage at least, whether these inspections may be made, but whether they may be made without a warrant. For example, to say that gambling raids may not be made at the discretion of the police without a warrant is not necessarily to say that gambling raids may never be made. In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. See *Schmerber* v. *California*, 384 U. S. 757, 770–771. It has nowhere been urged that fire, health, and housing code inspection programs could not achieve their goals within the confines of a reasonable search warrant requirement. Thus, we do not find the public need argument dispositive.

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In summary, we hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual, and that the reasons put forth in *Frank* v. *Maryland* and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment's protections. Because of the nature of the municipal programs under consideration, however, these conclusions must be the beginning, not the end, of our inquiry. The *Frank* majority gave recognition to the unique character of these inspection programs by refusing to require search warrants; to reject that disposition does not justify ignoring the question whether some other accommodation between public need and individual rights is essential.

II.

The Fourth Amendment provides that, "no Warrants shall issue, but upon probable cause." Borrowing from more typical Fourth Amendment cases, appellant argues not only that code enforcement inspection programs must be circumscribed by a warrant procedure, but also that warrants should issue only when the inspector possesses probable cause to believe that a particular dwelling contains violations of the minimum standards prescribed by the code being enforced. We disagree.

In cases in which the Fourth Amendment requires that a warrant to search be obtained, "probable cause" is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness. To apply this standard, it is obviously necessary first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally pro-

tected interests of the private citizen. For example, in a criminal investigation, the police may undertake to recover specific stolen or contraband goods. But that public interest would hardly justify a sweeping search of an entire city conducted in the hope that these goods might be found. Consequently, a search for these goods, even with a warrant, is "reasonable" only when there is "probable cause" to believe that they will be uncovered in a particular dwelling.

Unlike the search pursuant to a criminal investigation, the inspection programs at issue here are aimed at securing city-wide compliance with minimum physical standards for private property. The primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public health and safety. Because fires and epidemics may ravage large urban areas, because unsightly conditions adversely affect the economic values of neighboring structures, numerous courts have upheld the police power of municipalities to impose and enforce such minimum standards even upon existing structures.[11] In determining whether a particular inspection is reasonable—and thus in determining whether there is probable cause to issue a warrant for that inspection—the need for the inspection must be weighed in terms of these reasonable goals of code enforcement.

There is unanimous agreement among those most familiar with this field that the only effective way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic

[11] See *Abbate Bros.* v. *City of Chicago*, 11 Ill. 2d 337, 142 N. E. 2d 691; *City of Louisville* v. *Thompson*, 339 S. W. 2d 869 (Ky.); *Adamec* v. *Post*, 273 N. Y. 250, 7 N. E. 2d 120; *Paquette* v. *City of Fall River*, 338 Mass. 368, 155 N. E. 2d 775; *Richards* v. *City of Columbia*, 227 S. C. 538, 88 S. E. 2d 683; *Boden* v. *City of Milwaukee*, 8 Wis. 2d 318, 99 N. W. 2d 156.

inspections of all structures.[12] It is here that the probable cause debate is focused, for the agency's decision to conduct an area inspection is unavoidably based on its appraisal of conditions in the area as a whole, not on its knowledge of conditions in each particular building. Appellee contends that, if the probable cause standard urged by appellant is adopted, the area inspection will be eliminated as a means of seeking compliance with code standards and the reasonable goals of code enforcement will be dealt a crushing blow.

In meeting this contention, appellant argues first, that his probable cause standard would not jeopardize area inspection programs because only a minute portion of the population will refuse to consent to such inspections, and second, that individual privacy in any event should be given preference to the public interest in conducting such inspections. The first argument, even if true, is irrelevant to the question whether the area inspection is reasonable within the meaning of the Fourth Amendment. The second argument is in effect an assertion that the area inspection is an unreasonable search. Unfortunately, there can be no ready test for determining reasonableness

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[12] See Osgood & Zwerner, Rehabilitation and Conservation, 25 Law & Contemp. Prob. 705, 718 and n. 43; Schwartz, Crucial Areas in Administrative Law, 34 Geo. Wash. L. Rev. 401, 423 and n. 93; Comment, Rent Withholding and the Improvement of Substandard Housing, 53 Calif. L. Rev. 304, 316–317; Note, Enforcement of Municipal Housing Codes, 78 Harv. L. Rev. 801, 807, 851; Note, Municipal Housing Codes, 69 Harv. L. Rev. 1115, 1124–1125. Section 311 (a) of the Housing and Urban Development Act of 1965, 79 Stat. 478, 42 U. S. C. § 1468 (1964 ed., Supp. I), authorizes grants of federal funds "to cities, other municipalities, and counties for the purpose of assisting such localities in carrying out programs of concentrated code enforcement in deteriorated or deteriorating areas in which such enforcement, together with those public improvements to be provided by the locality, may be expected to arrest the decline of the area."

other than by balancing the need to search against the invasion which the search entails. But we think that a number of persuasive factors combine to support the reasonableness of area code-enforcement inspections. First, such programs have a long history of judicial and public acceptance. See *Frank* v. *Maryland,* 359 U. S., at 367–371. Second, the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results. Many such conditions—faulty wiring is an obvious example—are not observable from outside the building and indeed may not be apparent to the inexpert occupant himself. Finally, because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy. Both the majority and the dissent in *Frank* emphatically supported this conclusion:

> "Time and experience have forcefully taught that the power to inspect dwelling places, either as a matter of systematic area-by-area search or, as here, to treat a specific problem, is of indispensable importance to the maintenance of community health; a power that would be greatly hobbled by the blanket requirement of the safeguards necessary for a search of evidence of criminal acts. The need for preventive action is great, and city after city has seen this need and granted the power of inspection to its health officials; and these inspections are apparently welcomed by all but an insignificant few. Certainly, the nature of our society has not vitiated the need for inspections first thought necessary 158 years ago, nor has experience revealed any abuse or inroad on freedom in meeting this need by means that history and dominant public opinion have sanctioned." 359 U. S., at 372.

> ". . . This is not to suggest that a health official need show the same kind of proof to a magistrate to obtain a warrant as one must who would search for the fruits or instrumentalities of crime. Where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken. Experience may show the need for periodic inspections of certain facilities without a further showing of cause to believe that substandard conditions dangerous to the public are being maintained. The passage of a certain period without inspection might of itself be sufficient in a given situation to justify the issuance of a warrant. The test of 'probable cause' required by the Fourth Amendment can take into account the nature of the search that is being sought." 359 U. S., at 383 (MR. JUSTICE DOUGLAS, dissenting).

Having concluded that the area inspection is a "reasonable" search of private property within the meaning of the Fourth Amendment, it is obvious that "probable cause" to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (*e. g.*, a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling. It has been suggested that so to vary the probable cause test from the standard applied in criminal cases would be to authorize a "synthetic search warrant" and thereby to lessen the overall protections of the Fourth Amendment. *Frank* v. *Maryland*, 359

U. S., at 373. But we do not agree. The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant. Cf. *Oklahoma Press Pub. Co.* v. *Walling,* 327 U. S. 186. Such an approach neither endangers time-honored doctrines applicable to criminal investigations nor makes a nullity of the probable cause requirement in this area. It merely gives full recognition to the competing public and private interests here at stake and, in so doing, best fulfills the historic purpose behind the constitutional right to be free from unreasonable government invasions of privacy. See *Eaton* v. *Price,* 364 U. S., at 273–274 (opinion of MR. JUSTICE BRENNAN).

III.

Since our holding emphasizes the controlling standard of reasonableness, nothing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations. See *North American Cold Storage Co.* v. *City of Chicago,* 211 U. S. 306 (seizure of unwholesome food); *Jacobson* v. *Massachusetts,* 197 U. S. 11 (compulsory smallpox vaccination); *Compagnie Francaise* v. *Board of Health,* 186 U. S. 380 (health quarantine); *Kroplin* v. *Truax,* 119 Ohio St. 610, 165 N. E. 498 (summary destruction of tubercular cattle). On the other hand, in the case of most routine area inspections, there is no compelling urgency to inspect at a particular time or on a particular day. Moreover, most citizens allow inspections of their property without a warrant. Thus, as a practical matter and in light of the Fourth Amendment's requirement that a warrant specify the property to be searched, it seems likely that warrants should normally be sought only after entry is refused unless

there has been a citizen complaint or there is other satisfactory reason for securing immediate entry. Similarly, the requirement of a warrant procedure does not suggest any change in what seems to be the prevailing local policy, in most situations, of authorizing entry, but not entry by force, to inspect.

IV.

In this case, appellant has been charged with a crime for his refusal to permit housing inspectors to enter his leasehold without a warrant. There was no emergency demanding immediate access; in fact, the inspectors made three trips to the building in an attempt to obtain appellant's consent to search. Yet no warrant was obtained and thus appellant was unable to verify either the need for or the appropriate limits of the inspection. No doubt, the inspectors entered the public portion of the building with the consent of the landlord, through the building's manager, but appellee does not contend that such consent was sufficient to authorize inspection of appellant's premises. Cf. *Stoner* v. *California*, 376 U. S. 483; *Chapman* v. *United States*, 365 U. S. 610; *McDonald* v. *United States*, 335 U. S. 451. Assuming the facts to be as the parties have alleged, we therefore conclude that appellant had a constitutional right to insist that the inspectors obtain a warrant to search and that appellant may not constitutionally be convicted for refusing to consent to the inspection. It appears from the opinion of the District Court of Appeal that under these circumstances a writ of prohibition will issue to the criminal court under California law.

The judgment is vacated and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

[For dissenting opinion of Mr. Justice Clark, see *post*, p. 546.]

SEE *v.* CITY OF SEATTLE.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 180. Argued February 15, 1967.—Decided June 5, 1967.

A suitable warrant procedure *held* required by the Fourth Amendment to effect unconsented administrative entry and inspection of private commercial premises. Cf. *Camara* v. *Municipal Court, ante,* p. 523. Pp. 542–546.

67 Wash. 2d 475, 408 P. 2d 262, reversed.

Norman Dorsen argued the cause for appellant. With him on the briefs were *Melvin L. Wulf* and *Marvin M. Karpatkin.*

A. L. Newbould argued the cause for appellee. With him on the brief was *Charles S. Rhyne.*

MR. JUSTICE WHITE delivered the opinion of the Court.

Appellant seeks reversal of his conviction for refusing to permit a representative of the City of Seattle Fire Department to enter and inspect appellant's locked commercial warehouse without a warrant and without probable cause to believe that a violation of any municipal ordinance existed therein. The inspection was conducted as part of a routine, periodic city-wide canvass to obtain compliance with Seattle's Fire Code. City of Seattle Ordinance No. 87870, c. 8.01. After he refused the inspector access, appellant was arrested and charged with violating § 8.01.050 of the Code:

> "INSPECTION OF BUILDING AND PREMISES. It shall be the duty of the Fire Chief to inspect and he may enter all buildings and premises, except the interiors of dwellings, as often as may be necessary for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire, or any violations of the provisions of this Title, and of any other ordinance concerning fire hazards."

Appellant was convicted and given a suspended fine of $100 [1] despite his claim that § 8.01.050, if interpreted to authorize this warrantless inspection of his warehouse, would violate his rights under the Fourth and Fourteenth Amendments. We noted probable jurisdiction and set this case for argument with *Camara* v. *Municipal Court, ante,* p. 523. 385 U. S. 808. We find the principles enunciated in the *Camara* opinion applicable here and therefore we reverse.

In *Camara,* we held that the Fourth Amendment bars prosecution of a person who has refused to permit a warrantless code-enforcement inspection of his personal residence. The only question which this case presents is whether *Camara* applies to similar inspections of commercial structures which are not used as private residences. The Supreme Court of Washington, in affirming appellant's conviction, suggested that this Court "has applied different standards of reasonableness to searches of dwellings than to places of business," citing *Davis* v. *United States,* 328 U. S. 582. The Washington court held, and appellee here argues, that § 8.01.050, which excludes "the interiors of dwellings," [2] establishes a

[1] Conviction and sentence were pursuant to § 8.01.140 of the Fire Code:

"PENALTY. Anyone violating or failing to comply with any provision of this Title or lawful order of the Fire Chief pursuant hereto shall upon conviction thereof be punishable by a fine not to exceed Three Hundred Dollars ($300.00), or imprisonment in the City Jail for a period not to exceed ninety (90) days, or by both such fine and imprisonment, and each day of violation shall constitute a separate offense."

[2] "Dwelling" is defined in the Code as "a building occupied exclusively for residential purposes and having not more than two (2) dwelling units." Such dwellings are subject to the substantive provisions of the Code, but the Fire Chief's right to enter such premises is limited to times "when he has reasonable cause to believe a violation of the provisions of this Title exists therein." § 8.01.040. This provision also lacks a warrant procedure.

reasonable scheme for the warrantless inspection of commercial premises pursuant to the Seattle Fire Code.

In *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344; *Amos* v. *United States,* 255 U. S. 313; and *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, this Court refused to uphold otherwise unreasonable criminal investigative searches merely because commercial rather than residential premises were the object of the police intrusions. Likewise, we see no justification for so relaxing Fourth Amendment safeguards where the official inspection is intended to aid enforcement of laws prescribing minimum physical standards for commercial premises. As we explained in *Camara,* a search of private houses is presumptively unreasonable if conducted without a warrant. The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant.

As governmental regulation of business enterprise has mushroomed in recent years, the need for effective investigative techniques to achieve the aims of such regulation has been the subject of substantial comment and legislation.[3] Official entry upon commercial property

[3] See Antitrust Civil Process Act of 1962, 76 Stat. 548, 15 U. S. C. §§ 1311–1314; H. R. Rep. No. 708, 83d Cong., 1st Sess. (1953) (reporting the "factory inspection" amendments to the Federal Food, Drug, and Cosmetic Act, 67 Stat. 476, 21 U. S. C. § 374); Davis, The Administrative Power of Investigation, 56 Yale L. J. 1111; Handler, The Constitutionality of Investigations by the Federal Trade Commission, I & II, 28 Col. L. Rev. 708, 905; Schwartz, Crucial Areas in Administrative Law, 34 Geo. Wash. L. Rev. 401, 425–430; Note, Constitutional Aspects of Federal Tax Investigations, 57 Col. L. Rev. 676.

is a technique commonly adopted by administrative agencies at all levels of government to enforce a variety of regulatory laws; thus, entry may permit inspection of the structure in which a business is housed, as in this case, or inspection of business products, or a perusal of financial books and records. This Court has not had occasion to consider the Fourth Amendment's relation to this broad range of investigations.[4] However, we have dealt with the Fourth Amendment issues raised by another common investigative technique, the administrative subpoena of corporate books and records. We find strong support in these subpoena cases for our conclusion that warrants are a necessary and a tolerable limitation on the right to enter upon and inspect commercial premises.

It is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.[5] The agency has the right to conduct all reasonable inspections of such documents which are contemplated by statute, but it must delimit the confines of a search by designating the needed documents in a formal subpoena. In addition, while the demand to inspect may be issued by the agency, in the form of an administrative subpoena, it may not be made and en-

[4] In *United States* v. *Cardiff*, 344 U. S. 174, this Court held that the Federal Food, Drug, and Cosmetic Act did not compel that consent be given to warrantless inspections of establishments covered by the Act. (As a result, the statute was subsequently amended, see n. 3, *supra*.) See also *Federal Trade Comm'n* v. *American Tobacco Co.*, 264 U. S. 298.

[5] See *United States* v. *Morton Salt Co.*, 338 U. S. 632; *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186; *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707; *Hale* v. *Henkel*, 201 U. S. 43. See generally 1 Davis, Administrative Law §§ 3.05–3.06 (1958).

forced by the inspector in the field, and the subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply.

It is these rather minimal limitations on administrative action which we think are constitutionally required in the case of investigative entry upon commercial establishments. The agency's particular demand for access will of course be measured, in terms of probable cause to issue a warrant, against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved. But the decision to enter and inspect will not be the product of the unreviewed discretion of the enforcement officer in the field.[6] Given the analogous investigative functions performed by the administrative subpoena and the demand for entry, we find untenable the proposition that the subpoena, which has been termed a "constructive" search, *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186, 202, is subject to Fourth Amendment limitations which do not apply to actual searches and inspections of commercial premises.

We therefore conclude that administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure.[7] We do not in any way

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[6] We do not decide whether warrants to inspect business premises may be issued only after access is refused; since surprise may often be a crucial aspect of routine inspections of business establishments, the reasonableness of warrants issued in advance of inspection will necessarily vary with the nature of the regulation involved and may differ from standards applicable to private homes.

[7] *Davis* v. *United States*, 328 U. S. 582, relied upon by the Supreme Court of Washington, held only that government officials could demand access to business premises and, upon obtaining consent to search, could seize gasoline ration coupons issued by the

imply that business premises may not reasonably be inspected in many more situations than private homes, nor do we question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product. Any constitutional challenge to such programs can only be resolved, as many have been in the past, on a case-by-case basis under the general Fourth Amendment standard of reasonableness. We hold only that the basic component of a reasonable search under the Fourth Amendment—that it not be enforced without a suitable warrant procedure—is applicable in this context, as in others, to business as well as to residential premises. Therefore, appellant may not be prosecuted for exercising his constitutional right to insist that the fire inspector obtain a warrant authorizing entry upon appellant's locked warehouse.

Reversed.

MR. JUSTICE CLARK, with whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, dissenting.*

Eight years ago my Brother Frankfurter wisely wrote in *Frank* v. *Maryland*, 359 U. S. 360 (1959):

> "Time and experience have forcefully taught that the power to inspect dwelling places, either as a matter of systematic area-by-area search or, as here, to treat a specific problem, is of indispensable importance to the maintenance of community health; a power that would be greatly hobbled by the blanket requirement of the safeguards necessary for a search of evidence of criminal acts. The need for pre-

Government and illegally possessed by the petitioner. *Davis* thus involved the reasonableness of a particular search of business premises but did not involve a search warrant issue.

*[This opinion applies also to No. 92, *Camara* v. *Municipal Court of the City and County of San Francisco*, *ante*, p. 523.]

> ventive action is great, and city after city has seen this need and granted the power of inspection to its health officials; and these inspections are apparently welcomed by all but an insignificant few." At 372.

Today the Court renders this municipal experience, which dates back to Colonial days, for naught by overruling *Frank* v. *Maryland* and by striking down hundreds of city ordinances throughout the country and jeopardizing thereby the health, welfare, and safety of literally millions of people.

But this is not all. It prostitutes the command of the Fourth Amendment that "no Warrants shall issue, but upon probable cause" and sets up in the health and safety codes area inspection a newfangled "warrant" system that is entirely foreign to Fourth Amendment standards. It is regrettable that the Court wipes out such a long and widely accepted practice and creates in its place such enormous confusion in all of our towns and metropolitan cities in one fell swoop. I dissent.

I.

I shall not treat in any detail the constitutional issue involved. For me it was settled in *Frank* v. *Maryland, supra.* I would adhere to that decision and the reasoning therein of my late Brother Frankfurter. Time has not shown any need for change. Indeed the opposite is true, as I shall show later. As I read it, the Fourth Amendment guarantee of individual privacy is, by its language, specifically qualified. It prohibits only those searches that are "unreasonable." The majority seem to recognize this for they set up a new test for the long-recognized and enforced Fourth Amendment's "probable-cause" requirement for the issuance of warrants. They would permit the issuance of paper warrants, in area inspection programs, with probable cause based on area inspection standards as set out in municipal codes, and

with warrants issued by the rubber stamp of a willing magistrate.[1] In my view, this degrades the Fourth Amendment.

II.

Moreover, history supports the *Frank* disposition. Over 150 years of city *in rem* inspections for health and safety purposes have continuously been enforced. In only one case during all that period have the courts denied municipalities this right. See *District of Columbia* v. *Little*, 85 U. S. App. D. C. 242, 178 F. 2d 13 (1949), aff'd on other grounds, 339 U. S. 1 (1950). In addition to the two cases in this Court (*Frank, supra*, and *Eaton* v. *Price*, 364 U. S. 263 (1960)), which have upheld the municipal action, not a single state high court has held against the validity of such ordinances. Indeed, since our *Frank* decision five of the States' highest courts have found that reasonable inspections are constitutionally permissible and in fact imperative, for the protection of health, safety, and welfare of the millions who inhabit our cities and towns.[2]

I submit that under the carefully circumscribed requirements of health and safety codes, as well as the facts and circumstances of these particular inspections,

[1] Under the probable-cause standard laid down by the Court, it appears to me that the issuance of warrants could more appropriately be the function of the agency involved than that of the magistrate. This would also relieve magistrates of an intolerable burden. It is therefore unfortunate that the Court fails to pass on the validity of the use of administrative warrants.

[2] *DePass* v. *City of Spartanburg*, 234 S. C. 198, 107 S. E. 2d 350 (1959); *City of St. Louis* v. *Evans*, 337 S. W. 2d 948 (Mo. 1960); *Camara* v. *Municipal Court*, 237 Cal. App. 2d 128, 46 Cal. Rptr. 585 (1965), pet. for hearing in Cal. Sup. Ct. den. (Civ. No. 22128) Nov. 19, 1965; *Commonwealth* v. *Hadley*, 351 Mass. 439, 222 N. E. 2d 681, appeal docketed, Jan. 5, 1967, No. 1179, Misc., O. T. 1966; *City of Seattle* v. *See*, 67 Wash. 2d 475, 408 P. 2d 262 (1965).

there is nothing unreasonable about the ones undertaken here. These inspections meet the Fourth Amendment's test of reasonableness and are entirely consistent with the Amendment's commands and our cases.

There is nothing here that suggests that the inspection was unauthorized, unreasonable, for any improper purpose, or designed as a basis for a criminal prosecution; nor is there any indication of any discriminatory, arbitrary, or capricious action affecting the appellant in either case. Indeed, Camara was admittedly violating the Code by living in quarters prohibited thereby; and See was operating a locked warehouse—a business establishment subject to inspection.

The majority say, however, that under the present system the occupant has no way of knowing the necessity for the inspection, the limits of the inspector's power, or whether the inspector is himself authorized to perform the search. Each of the ordinances here is supported by findings as to the necessity for inspections of this type and San Francisco specifically bans the conduct in which appellant Camara is admittedly engaged. Furthermore, all of these doubts raised by the Court could be resolved very quickly. Indeed, the inspectors all have identification cards which they show the occupant and the latter could easily resolve the remaining questions by a call to the inspector's superior or, upon demand, receive a written answer thereto. The record here shows these challenges could have been easily interposed. The inspectors called on several occasions, but still no such questions were raised.[3] These cases, from the outset, were based on the Fourth Amendment, not on any of the circumstances surrounding the attempted inspection. To say, there-

[3] Indeed, appellant Camara was summoned to the office of the district attorney—but failed to appear—where he certainly could have raised these questions.

fore, that the inspection is left to the discretion of the officer in the field is to reach a conclusion not authorized by this record or the ordinances involved here. The Court says the question is not whether the "inspections may be made, but whether they may be made without a warrant." With due respect, inspections of this type have been made for over a century and a half without warrants and it is a little late to impose a death sentence on such procedures now. In most instances the officer could not secure a warrant—such as in See's case—thereby insulating large and important segments of our cities from inspection for health and safety conditions. It is this situation—which is even recognized by the Court—that should give us pause.

III.

The great need for health and safety inspection is emphasized by the experience of San Francisco, a metropolitan area known for its cleanliness and safety ever since it suffered earthquake and fire back in 1906. For the fiscal year ending June 30, 1965, over 16,000 dwelling structures were inspected, of which over 5,600 required some type of compliance action in order to meet code requirements. And in 1965–1966 over 62,000 apartments, hotels, and dwellings were inspected with similar results. During the same period the Public Works Department conducted over 52,000 building inspections, over 43,000 electrical ones and over 33,000 plumbing inspections. During the entire year 1965–1966 inspectors were refused entry on less than 10 occasions where the ordinance required the householder to so permit.

In Seattle, the site of No. 180, *See* v. *City of Seattle*, fire inspections of commercial and industrial buildings totaled over 85,000 in 1965. In Jacksonville, Florida, over 21,000 fire inspections were carried on in the same year, while in excess of 135,000 health inspections were

conducted. In Portland, Oregon, out of 27,000 health and safety inspections over 4,500 violations of regulations were uncovered and the fire marshal in Portland found over 17,000 violations of the fire code in 1965 alone. In Boston over 56,000 code violations were uncovered in 1966 while in Baltimore a somewhat similar situation was reported.

In the larger metropolitan areas such as Los Angeles, over 300,000 inspections (health and fire) revealed over 28,000 hazardous violations. In Chicago during the period November 1965 to December 1966, over 18,000 buildings were found to be rodent infested out of some 46,000 inspections. And in Cleveland the division of housing found over 42,000 violations of its code in 1965; its health inspectors found over 33,000 violations in commercial establishments alone and over 27,000 dwelling code infractions were reported in the same period. And in New York City the problem is even more acute. A grand jury in Brooklyn conducted a housing survey of 15 square blocks in three different areas and found over 12,000 hazardous violations of code restrictions in those areas alone. Prior to this test there were only 567 violations reported in the three areas. The pressing need for inspection is shown by the fact that some 12,000 additional violations were actually present at that very time.

An even more disastrous effect will be suffered in plumbing violations. These are not only more frequent but also the more dangerous to the community. Defective plumbing causes back siphonage of sewage and other household wastes. Chicago's disastrous amoebic dysentery epidemic is an example. Over 100 deaths resulted. Fire code violations also often cause many conflagrations. Indeed, if the fire inspection attempted in *District of Columbia* v. *Little*, 339 U. S. 1 (1950),

had been permitted a two-year-old child's death resulting from a fire that gutted the home involved there on August 6, 1949, might well have been prevented.

Inspections also play a vital role in urban redevelopment and slum clearance. Statistics indicate that slums constitute 20% of the residential area of the average American city, still they produce 35% of the fires, 45% of the major crimes, and 50% of the disease. Today's decision will play havoc with the many programs now designed to aid in the improvement of these areas. We should remember the admonition of MR. JUSTICE DOUGLAS in *Berman* v. *Parker*, 348 U. S. 26, 32 (1954):

> "Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden."

IV.

The majority propose two answers to this admittedly pressing problem of need for constant inspection of premises for fire, health, and safety infractions of municipal codes. First, they say that there will be few refusals of entry to inspect. Unlike the attitude of householders as to codes requiring entry for inspection, we have few empirical statistics on attitudes where consent must be obtained. It is true that in the required entry-to-inspect situations most occupants welcome the periodic visits of municipal inspectors. In my view this will not be true when consent is necessary. The City of Portland, Oregon, has a voluntary home inspection program. The 1966 record shows that out of 16,171 calls where the occupant was at home, entry was refused in 2,540 cases—approximately one out of six. This is a large percentage and would place an intolerable burden on the inspection serv-

ice when required to secure warrants. What is more important is that out of the houses inspected 4,515 hazardous conditions were found! Hence, on the same percentage, there would be approximately 840 hazardous situations in the 2,540 in which inspection was refused in Portland.

Human nature being what it is, we must face up to the fact that thousands of inspections are going to be denied. The economics of the situation alone will force this result. Homeowners generally try to minimize maintenance costs and some landlords make needed repairs only when required to do so. Immediate prospects for costly repairs to correct possible defects are going to keep many a door closed to the inspector. It was said by way of dissent in *Frank* v. *Maryland, supra,* at 384, that "[o]ne rebel a year" is not too great a price to pay for the right to privacy. But when voluntary inspection is relied upon this "one rebel" is going to become a general rebellion. That there will be a significant increase in refusals is certain and, as time goes on, that trend may well become a frightening reality. It is submitted that voluntary compliance cannot be depended upon.

The Court then addresses itself to the propriety of warrantless area inspections.[4] The basis of "probable cause" for area inspection warrants, the Court says, begins with the Fourth Amendment's reasonableness requirement; in determining whether an inspection is reasonable "the need for the inspection must be weighed in terms of these reasonable goals of code enforcement." It adds that there are "a number of persuasive factors"

[4] It is interesting to note that in each of the cases here the authorities were making periodic area inspections when the refusals to allow entry occurred. Under the holding of the Court today, "probable cause" would therefore be present in each case and a "paper warrant" would issue as a matter of course. This but emphasizes the absurdity of the holding.

supporting "the reasonableness of area code-enforcement inspections." It is interesting to note that the factors the Court relies upon are the identical ones my Brother Frankfurter gave for excusing warrants in *Frank* v. *Maryland, supra.* They are: long acceptance historically; the great public interest in health and safety; and the impersonal nature of the inspections—not for evidence of crime—but for the public welfare. Upon this reasoning, the Court concludes that probable cause exists "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." These standards will vary, it says, according to the code program and the condition of the area with reference thereto rather than the condition of a particular dwelling. The majority seem to hold that warrants may be obtained after a refusal of initial entry; I can find no such constitutional distinction or command. These boxcar warrants will be identical as to every dwelling in the area, save the street number itself. I daresay they will be printed up in pads of a thousand or more—with space for the street number to be inserted—and issued by magistrates in broadcast fashion as a matter of course.

I ask: Why go through such an exercise, such a pretense? As the same essentials are being followed under the present procedures, I ask: Why the ceremony, the delay, the expense, the abuse of the search warrant? In my view this will not only destroy its integrity but will degrade the magistrate issuing them and soon bring disrepute not only upon the practice but upon the judicial process. It will be very costly to the city in paperwork incident to the issuance of the paper warrants, in loss of time of inspectors and waste of the time of magistrates and will result in more annoyance to the public. It will also be more burdensome to the occupant of the premises to be inspected. Under a search warrant the inspector

can enter any time he chooses. Under the existing procedures he can enter only at reasonable times and invariably the convenience of the occupant is considered. I submit that the identical grounds for action elaborated today give more support—both legal and practical—to the present practice as approved in *Frank* v. *Maryland*, *supra*, than they do to this legalistic facade that the Court creates. In the Court's anxiety to limit its own holding as to mass searches it hopes to divert attention from the fact that it destroys the health and safety codes as they apply to individual inspections of specific problems as contrasted to area ones. While the latter are important, the individual inspection is often more so; that was true in *District of Columbia* v. *Little* and it may well be in both *Camara* and *See*. Frankly, I cannot understand how the Court can authorize warrants in wholesale fashion in the case of an area inspection, but hold the hand of the inspector when a specific dwelling is hazardous to the health and safety of its neighbors.

DENVER & RIO GRANDE WESTERN RAILROAD CO. *v.* BROTHERHOOD OF RAILROAD TRAINMEN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 794. Argued April 19, 1967.—Decided June 5, 1967.

Petitioner, railroad, brought suit in federal court in Colorado against respondent union, an unincorporated association with headquarters in Ohio, and certain individual members, for damages resulting from a strike in violation of the Railway Labor Act. At the time the suit was brought, venue in federal-question cases lay only in the district "where all defendants reside." 28 U. S. C. § 1391 (b). The statute did not define the residence of an unincorporated association. Subsequently that statute was amended to permit suits also in the district where the claim arises. The union's motion to dismiss for improper venue was overruled, the case was tried, and judgment was entered for petitioner. The Court of Appeals reversed, holding that the union could be sued under § 1391 (b) only in the district of its residence and that its residence was not in Colorado. *Held:*

1. The residence of an unincorporated association (which should be viewed as an entity for venue purposes) under the previous version of § 1391 (b) refers to wherever it is "doing business." Pp. 559–563.

2. The District Court should now determine whether or not respondent was "doing business" in Colorado; if it finds that respondent was not, the appropriateness of venue under the current version of § 1391 (*i. e.*, whether the claim "arose" in Colorado) should be considered. Pp. 563–564.

367 F. 2d 137, reversed and remanded.

Martin M. Lucente argued the cause for petitioner. With him on the briefs were *Ernest Porter, Kenneth D. Barrows* and *George L. Saunders, Jr.*

James L. Highsaw, Jr., argued the cause for respondents. With him on the brief was *Edward J. Hickey, Jr.*

Francis M. Shea, Richard T. Conway, Ralph J. Moore, Jr., James R. Wolfe and *Charles I. Hopkins, Jr.*, filed a brief for the National Railway Labor Conference, as *amicus curiae*, urging reversal.

Frederick Bernays Wiener filed a brief for the Railway Labor Executives' Association, as *amicus curiae*, urging affirmance.

MR. JUSTICE WHITE delivered the opinion of the Court.

The question here concerns the proper venue for a suit against a labor union, an unincorporated association, under 28 U. S. C. § 1391 (b), which at the time this action was brought read as follows: "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law."

In December 1959 and January 1960, the National Railroad Adjustment Board issued monetary awards in favor of certain members of respondent union on their claims for breach of collective bargaining contracts between the union and petitioner, the Denver & Rio Grande Western Railroad Company. The railroad refused to honor the awards, the union struck to enforce them and the strike was permanently enjoined by the District Court. 185 F. Supp. 369, aff'd, 290 F. 2d 266, cert. denied, 366 U. S. 966. The railroad then sued the union for damages in the United States District Court for the District of Colorado, also joining as defendants R. E. Carroll, chairman of the union's General Grievance Committee on the property of petitioner, and the chairmen of various local lodges of the union. The complaint alleged that the defendants had breached their duties under the Railway Labor Act, 44 Stat. 577, as amended, 45 U. S. C. § 151 *et seq.* The District Court overruled

the union's motion to dismiss for improper venue, held the strike illegal because the union had failed to exhaust its statutory remedies to enforce the Adjustment Board awards, and awarded damages based on the railroad's loss of traffic caused by the illegal strike. The judgment ran against both the union and Carroll, the case against the other defendants being dismissed for failure of proof. The Court of Appeals reversed, holding that the union could be sued under § 1391 (b) only in the district of its residence and that its residence was not in Colorado.[1] Because of the seeming conflict with *Rutland R. Co.* v. *Brotherhood of Locomotive Eng'rs,* 307 F. 2d 21, we granted certiorari. 385 U. S. 1000. We reverse.

Section 1391 (b) is the general venue statute governing transitory causes of action in the federal courts where jurisdiction does not depend wholly on diversity of citizenship. Following its amendment in 1966, 80 Stat. 1111, the section permits suit either in the district where all of the defendants reside or in the district where the claim arose. At the time this suit was brought, however, venue lay only at the defendant's residence, as had been the case since 1887. 24 Stat. 552, as corrected by 25 Stat. 433 (1888). Thus for almost 80 years proper venue in federal-question cases was limited to the district of the defendant's residence, whether the defendant was an individual, a corporation, or an unincorporated association such as this respondent. During all of this time, down to and including the 1966 amendment, Congress has not expressly defined the residence of an unincorporated association for purposes of the general venue statute. The same was true with respect to corporations until 1948

[1] The Court of Appeals also reversed the damage award against respondent Carroll, concluding that Carroll was not responsible for the strike in question. We do not disturb this factual determination of the Court of Appeals. Carroll's residence is admittedly within the District of Colorado.

when Congress directed that a corporation could be sued in the judicial district "in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes." 28 U. S. C. § 1391 (c). Congress has maintained its silence, however, with respect to the residence of the unincorporated association. The resolution of that issue, as was true for the corporation prior to 1948, has been left to the courts. The issue is now here for the first time.

Of course, venue for a suit against an unincorporated association becomes important only if the association is itself suable. At common law, such an association could be sued only in the names of its members and liability had to be enforced against each member. This principle was rejected in *United Mine Workers* v. *Coronado Co.*, 259 U. S. 344, where this Court, recognizing the growth and pervasive influence of labor organizations and noting that the suability of trade unions "is of primary importance in the working out of justice and in protecting individuals and society . . . ," 259 U. S., at 390, held that such organizations were suable in the federal courts and that funds accumulated by them were subject to execution in suits for torts committed during strikes. The *Coronado* holding is now reflected in Fed. Rule Civ. Proc. 17 (b).

The *Coronado* case dealt with capacity to be sued, not with venue, but it did legitimate suing the unincorporated association as an entity. Although that entity has no citizenship independent of its members for purposes of diversity jurisdiction, *Steelworkers* v. *Bouligny, Inc.*, 382 U. S. 145, a case relied upon by the Court of Appeals here, we think that the question of the proper venue for such a defendant, like the question of capacity, should be determined by looking to the residence of the association itself rather than that of its individual mem-

bers. Otherwise, § 1391 (b) would seem to require either holding the association not suable at all where its members are residents of different States, or holding that the association "resides" in any State in which any of its members resides. The first alternative seems wholly at odds with *Coronado* and in addition removes federal-question litigation from the federal courts unnecessarily; the second is patently unfair to the association when it is remembered that venue is primarily a matter of convenience of litigants and witnesses. H. R. Rep. No. 1893, 89th Cong., 2d Sess., p. 2. Of course, having concluded that the unincorporated association should be viewed as an entity for purposes of residence under § 1391 (b), that residence must still be ascertained, an inquiry requiring examination of congressional intent and the interests reflected in *Coronado* and in principles underlying venue limitations.

In *Sperry Prods., Inc.* v. *Association of American Railroads,* 132 F. 2d 408, the Court of Appeals for the Second Circuit dealt with the issue of what district an unincorporated association may be said to inhabit under the special venue statute governing patent suits, then 28 U. S. C. § 109 (1940 ed.), now 28 U. S. C. § 1400. That court thought the association should be treated like a corporation. Under the decisions of this Court, corporations had a single residence for venue purposes, the State of their incorporation. Likewise, the *Sperry* court thought the unincorporated association should be considered as having a single residence, in its case its principal place of business. *Neirbo Co.* v. *Bethlehem Corp.,* 308 U. S. 165, had already determined, however, that corporations, while having only one residence, nevertheless consented to be sued in federal diversity suits where they were licensed to do business. And *Neirbo* had much to do with producing the 1948 congressional definition of corporate residence as including not only the State of in-

corporation but wherever the corporation is licensed to do business or is doing business.

It can be argued, as respondent does, that had the 1948 Congress intended the expanded definition of corporate residence to apply to labor unions and other unincorporated associations, it would have said so. But even accepting this, the question of what the association's residence is for venue purposes remains unanswered. Saying that Congress did not intend to "change" the venue law with respect to unincorporated associations assumes a settled meaning to the prior law. This was not the case. There was no settled construction of the law in the courts in 1948, and there is none yet. Nor was there anything to indicate that Congress had considered a labor union's residence to be in only one place or had ever intended a limited view of residence with respect to unincorporated associations. Rather than accepting respondent's position, we view the action of Congress in 1948 as simply correcting an unacceptably narrow definition of corporate residence which had been adopted by the courts, while maintaining its silence with respect to the unincorporated association. And if it is assumed that Congress was aware of *Sperry* at all, it is surely reasonable to think that Congress anticipated that the approach of that case, analogizing incorporated and unincorporated entities, would continue to be followed by the courts so that if corporate residence were broadly defined by the Congress, the courts would similarly construe the concept of residence of the unincorporated association. This was the approach of the Court of Appeals for the Second Circuit in *Rutland R. Co.* v. *Brotherhood of Locomotive Eng'rs, supra.*[2]

[2] Other lower court cases are divided on the question whether an unincorporated association can be sued at a place other than its principal place of business. Cases restricting venue to the association's principal place of business include *Brotherhood of Locomotive*

We think it most nearly approximates the intent of Congress to recognize the reality of the multi-state, unincorporated association such as a labor union and to permit suit against that entity, like the analogous corporate entity, wherever it is "doing business." Congress has itself recognized as much in a special venue statute, § 301 (c) of the Labor Management Relations Act, 1947, 61 Stat. 157, 29 U. S. C. § 185 (c), which provides that actions against labor unions governed by the Labor Management Relations Act may be brought in any district where the union maintains its principal office or in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members. That statute was enacted but a year before the 1948 revision of the Judicial Code, and while it does not mention residence, it is a considerable indication that Congress had no desire, then or at any previous time, to construe "residence" as used in the general venue provision so as to confine suits against a labor union to the district where its principal office is located. Moreover, from the standpoint of convenience to parties and witnesses, there would be little merit in holding that suits against unions covered by the National Labor Relations Act may be brought

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Firemen v. *Graham*, 84 U. S. App. D. C. 67, 69, n. 2, 175 F. 2d 802, 804, n. 2, rev'd on other grounds, 338 U. S. 232; *McNutt* v. *United Gas, Coke & Chem. Workers*, 108 F. Supp. 871, 875; *Salvant* v. *Louisville & N. R. Co.*, 83 F. Supp. 391, 396; *Westinghouse Elec. Corp.* v. *United Elec. Radio & Mach. Workers*, 92 F. Supp. 841, aff'd without discussion, 194 F. 2d 770; *Cherico* v. *Brotherhood of R. R. Trainmen*, 167 F. Supp. 635, 637–638; cf. *Hadden* v. *Small*, 145 F. Supp. 387 (partnership). Cases holding that unincorporated associations may be sued where they do business: *Portsmouth Baseball Corp.* v. *Frick*, 132 F. Supp. 922; *Eastern Motor Express* v. *Espenshade*, 138 F. Supp. 426, 432; *American Airlines, Inc.* v. *Air Line Pilots Assn.*, 169 F. Supp. 777, 781–783; *R & E Dental Supply Co.* v. *Ritter Co.*, 185 F. Supp. 812; cf. *Joscar Co.* v. *Consolidated Sun Ray, Inc.*, 212 F. Supp. 634.

anywhere the responsible representatives of the union take concrete action and yet hold that suits for similar conduct against unions subject to a parallel federal labor statute, the Railway Labor Act, may be brought only where the union's principal office is located. Nor need we here be concerned, as in *Bouligny*, with possible effects on the scope of the jurisdiction of the federal courts. Under these circumstances, for this Court to create such a distinction without some positive lead from Congress and in the face of sound policy considerations to the contrary would be unjustified.

We therefore conclude that the Court of Appeals improperly applied § 1391 (b) as it read when this suit was brought. But even if we instead agreed with the Court of Appeals on this question, the case must be considered in light of the present form of that section, that is, as amended by the Act of November 2, 1966, which provides for venue not only at the place of a defendant's residence but also in the district where the claim arose. This amendment does not change the substantive law applicable to this lawsuit. It is wholly procedural. Absent some contrary indications by the Congress and absent any procedural prejudice to either party, the 1966 amendment to § 1391 is applicable to this suit. See *United States* v. *Alabama*, 362 U. S. 602; *Ex parte Collett*, 337 U. S. 55; *American Foundries* v. *Tri-City Council*, 257 U. S. 184, 201; *Pruess* v. *Udall*, 123 U. S. App. D. C. 301, 359 F. 2d 615. As this Court said in applying 28 U. S. C. § 1404 (a) to pending actions, "No one has a vested right in any given mode of procedure." *Ex parte Collett*, 337 U. S., at 71. And in any event, if the decision below were affirmed, the petitioner could reinstitute the same action in the same District Court and seek the benefits of the current version of § 1391, absent the barrier of any applicable statute of limitations. We do not, of course, intimate any views as to

whether this claim "arose" in the District of Colorado. That would be an issue for the District Court should it now be determined, in light of this opinion, that respondent was not doing business in Colorado when this suit was instituted.

Reversed and remanded.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS, and MR. JUSTICE FORTAS join, dissenting.

This suit for damages caused by an illegal strike was brought by the Denver and Rio Grande Western Railroad against the Brotherhood of Railroad Trainmen and certain of its individual members in the United States District Court for Colorado where the Brotherhood's local lodges went on strike. The Brotherhood, an unincorporated association with its headquarters and principal place of business in Cleveland, Ohio, filed a motion to dismiss on the ground of improper venue. The District Court denied this motion, and after a trial without a jury, gave the railroad a $37,988 judgment against the union. The Court of Appeals reversed. 367 F. 2d 137. It held that the applicable venue statute, 28 U. S. C. § 1391 (b),[1] gave venue only to the district court for the district where the union's principal place of business is located. I would affirm this holding.

In holding venue improper as to the union, the Court of Appeals rejected the holding of the Second Circuit in *Rutland R. Co.* v. *Brotherhood of Locomotive Eng'rs,* 307 F. 2d 21, cert. denied, 372 U. S. 954, that a union may be sued under § 1391 (b) in any district where it is doing business. The Second Circuit in *Rutland* recog-

[1] 28 U. S. C. § 1391 (b):

"A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law."

nized that prior to the Judicial Code of 1948, under the predecessor of § 1391 (b),[2] most courts had held that an unincorporated association is suable only at its principal place of business and that the only express change made in pre-existing general venue law by the 1948 Code was the expansion of corporate venue from the place of incorporation to the place of doing business, § 1391 (c).[3] Nevertheless, the court reasoned that there are sound policies for treating unincorporated associations like corporations and that, though the language of § 1391 (c) expressly applies to corporations and not to unincorporated associations, Congress implicitly intended for the expanded concepts of corporate residence under § 1391 (c) to be applied in determining the residence of an unincorporated association under § 1391 (b).

For myself I cannot draw any such inference from the 1948 amendments to the general venue statute. Sections 1391 (b) and (c) were part of a general Code revision designed comprehensively to cover the rules of procedure, including venue, and there is no reference whatever in these sections or their legislative history, so far as I can determine, that would permit us to infer that Congress intended that unincorporated associations be treated as corporations for venue purposes, thus changing the judicially established rule that unincorporated associations are suable only at their principal place of business. Though this Court recognizes that "Congress has maintained its silence . . . with respect to the residence of

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[2] 36 Stat. 1101, § 51, 28 U. S. C. § 112 (1940 ed.), provided that "no civil suit shall be brought in any district court against any person . . . in any other district than that whereof he is an inhabitant . . . ."

[3] 28 U. S. C. § 1391 (c):

"A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

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the unincorporated association," it approves the *Rutland* holding because "sound policy considerations" indicate it "most nearly approximates the intent of Congress." In reaching this result, the Court adopts the *Rutland* reasoning that Congress in 1948 must have approved of assimilating for venue purposes the treatment of unincorporated associations to that of corporations, because such a process of assimilation had been advocated by Judge Learned Hand in *Sperry Prods., Inc.* v. *Association of American Railroads*, 132 F. 2d 408, cert. denied, 319 U. S. 744. The narrow issue dealt with in *Sperry* was where, under the special venue provisions for a patent infringement suit,[4] is an unincorporated association deemed to be an "inhabitant." The *Sperry* court first held that, since an unincorporated association can be sued in its own name to enforce a federal right, *United Mine Workers* v. *Coronado Co.*, 259 U. S. 344, and since it can be served with process under Fed. Rule Civ. Proc. 17 (b), it should, for venue purposes, be treated as a single individual, not an aggregate of individuals.[5] The *Sperry* court then held that for purposes of the special patent venue provision an unincorporated association is an "inhabitant" of the district where its principal place of business is located—precisely what the Court of Appeals held here as to § 1391 (b). In reaching this result, Judge Hand advanced legislative policy reasons,

[4] 36 Stat. 1100, § 48, 28 U. S. C. § 109 (1940 ed.), provided that suits for patent infringement must be brought "in the district of which the defendant is an inhabitant, or in any district in which the defendant . . . shall have committed acts of infringement and have a regular and established place of business."

[5] None of the parties here have suggested that an unincorporated association's residence for venue purposes depends on the residence of each individual member, and I agree with the Court's holding that an unincorporated association like a union is a single entity with a residence. The only problem here is to locate that residence.

similar to those advanced by the Court here today, for treating an unincorporated association like a corporation, then deemed to be an inhabitant only of its State of incorporation and of the district within that State where its principal place of business was located. It is Judge Hand's process of reasoning, not his holding, that the Court uses in assimilating the treatment of unincorporated associations under § 1391 (b) to the treatment of corporations under § 1391 (c).

I find many objections to doing what the Court does here. First, even assuming that in enacting § 1391 Congress was aware of the *Sperry* decision and thought it applicable to general, as distinguished from patent, venue rules[6] (an assumption I think completely unfounded), it is doubtful that Congress, without saying so, intended to reject the holding of that case—that an unincorporated association is suable at its principal place of business—but at the same time adopt its reasoning—dicta to the effect that an unincorporated association should be treated like a corporation. Second, the only indication I can find of what Congress intended in 1948 as to unincorporated associations comes from Professor Moore, who participated in drafting the Code and who in 1949 wrote:

> "*Sperry Products, Inc.* v. *Association of American Railroads* took the position that an unincorporated association is an 'inhabitant,' i. e., resident, of the district where it has its principal place of business.

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[6] After *Sperry* the lower courts divided on whether its holding should be extended to the pre-1948 general venue provision (see n. 3, *supra*). Compare *Brotherhood of Locomotive Firemen* v. *Graham*, 84 U. S. App. D. C. 67, 175 F. 2d 802, rev'd on other grounds, 338 U. S. 232, and *Griffin* v. *Illinois Cent. R. Co.*, 88 F. Supp. 552, 555, with *Thermoid Co.* v. *United Rubber Workers*, 70 F. Supp. 228, 233–234.

> And this doctrine has been applied to a partnership . . . . The Code has changed none of these doctrines."[7]

Third, Congress in 1948 was clearly aware of the venue problems involved in suing an unincorporated association. Just the year before, in 1947, it had expressly considered these problems in relation to suits against labor unions to enforce collective bargaining agreements[8] and in § 301 (c) of the Labor Management Relations Act, 1947, 61 Stat. 157, 29 U. S. C. § 185 (c), explicitly provided for venue in such suits "(1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members." That action is wholly consistent with the idea that Congress' total failure in 1948 to provide a similar venue rule applicable to other kinds of suits against a union was neither inadvertent nor meant to be cured by judicial implication. Whether there is "little" or much "merit" in holding that venue of a union subject to the Railway Labor Act, 44 Stat. 577, as amended, is different from the venue of a union under the express venue provisions of the National Labor Relations Act, 49 Stat. 449, as

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[7] Moore, Commentary on the U. S. Judicial Code 193 (1949). Now, however, for legislative policy reasons such as the protection from abuse contained in the transfer provision of 28 U. S. C. § 1404 (a) and the multi-state nature of unincorporated associations' activities, Professor Moore believes the position taken in *Rutland* "desirable." 1 Moore, Federal Practice ¶ 0.142 [5.–4], at 1508. See also Comment, 44 Calif. L. Rev. 130 (1956); Note, 39 St. John's L. Rev. 353, 358–360 (1965); Note, 13 Okla. L. Rev. 206 (1960); 45 Geo. L. Rev. 132 (1956). But see Kaplan, Suits Against Unincorporated Associations Under the Federal Rules of Civil Procedure, 53 Mich. L. Rev. 945, 949–950 (1955); Comment, 8 Stan. L. Rev. 708 (1956).

[8] H. R. Rep. No. 245, 80th Cong., 1st Sess., 108–109 (1947); S. Rep. No. 105, 80th Cong., 1st Sess., 15–18 (1947).

amended, is a question for Congress, not this Court. Finally, since 1948 the lower courts have been completely divided on the question of whether an unincorporated association can be sued at a place other than its principal place of business.[9] In the light of all these things, I cannot impute to Congress an unarticulated intent to make an unincorporated association's venue precisely the same as that of a corporation.

Neither the language and history of the general venue statute nor any prior decision of this Court throws any light on the question presented here. In the final analysis it is simply an important question of public policy. Reasons can logically be advanced for expanding the venue of unincorporated associations to include districts where they engage in business, but just as strong reasons can be advanced for not doing so. Though venue, relating to the convenience of the litigants, is quite different from jurisdiction, relating to the power of a court to adjudicate, *Neirbo Co.* v. *Bethlehem Corp.*, 308 U. S. 165, 167–168, and though Congress may have more constitutional leeway to deal with venue than with jurisdiction, *Steelworkers* v. *Bouligny, Inc.*, 382 U. S. 145, venue rules

[9] Cases holding an unincorporated association may be sued only at its principal place of business: *Brotherhood of Locomotive Firemen* v. *Graham, supra*, at 69, n. 2, 175 F. 2d, at 804; *McNutt* v. *United Gas, Coke & Chem. Workers*, 108 F. Supp. 871, 875; *Salvant* v. *Louisville & N. R. Co.*, 83 F. Supp. 391, 396; *Westinghouse Elec. Corp.* v. *United Elec. Radio & Mach. Workers*, 92 F. Supp. 841, 842, aff'd without discussion, 194 F. 2d 770; *Cherico* v. *Brotherhood of R. R. Trainmen*, 167 F. Supp. 635, 637–638; cf. *Hadden* v. *Small*, 145 F. Supp. 387 (partnership). Cases holding that an unincorporated association may be sued where it does business: *Portsmouth Baseball Corp.* v. *Frick*, 132 F. Supp. 922; *Eastern Motor Express* v. *Espenshade*, 138 F. Supp. 426, 432; *American Airlines, Inc.* v. *Air Line Pilots Assn.*, 169 F. Supp. 777, 781–783; *R & E Dental Supply Co.* v. *Ritter Co.*, 185 F. Supp. 812; cf. *Joscar Co.* v. *Consolidated Sun Ray, Inc.*, 212 F. Supp. 634.

nevertheless pose policy considerations which are and should be weighed by Congress and not by this Court. As we said in *Olberding* v. *Illinois Central R. Co.*, 346 U. S. 338, 340: "The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a 'liberal' construction." I think the Court oversteps its boundaries in doing that which Congress did not choose to do in expanding the venue provisions with reference to corporations. I would leave the law of venue as it is until Congress decides its own policy.[10]

I would affirm the judgment of the Court of Appeals.

[10] Since I agree with the Court that the 1966 amendment of § 1391 (b) should apply to pending cases such as this one, I would not have filed this dissent had the Court remanded this case solely for a determination of the propriety of venue under the 1966 amendment.

ELLIOTT *v.* OREGON.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON.

No. 1144, Misc. Decided June 5, 1967.

Certiorari granted; 244 Ore. 426, 418 P. 2d 263, vacated and remanded.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Oregon for further consideration in light of *Anders* v. *California,* 386 U. S. 738.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART are of the opinion that certiorari should be denied.

CLARK *v.* ALABAMA.

APPEAL FROM THE SUPREME COURT OF ALABAMA.

No. 1579, Misc. Decided June 5, 1967.

280 Ala. 493, 195 So. 2d 786, appeal dismissed and certiorari denied.

Petitioner *pro se.*

MacDonald Gallion, Attorney General of Alabama, *John G. Bookout,* Chief Assistant Attorney General, and *Robert F. Miller,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

IMMIGRATION AND NATURALIZATION SERVICE *v.* LAVOIE.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 513. Decided June 5, 1967.*

Certiorari granted; 360 F. 2d 27, vacated and remanded.

Solicitor General Marshall, Assistant Attorney General Vinson and *Beatrice Rosenberg* for petitioner.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment is vacated. *Boutilier* v. *Immigration and Naturalization Service, ante,* p. 118. The case is remanded to the United States Court of Appeals for the Ninth Circuit in order that that court may pass upon the issues in this case not covered by its prior opinion.

MR. JUSTICE DOUGLAS is of the opinion that certiorari should be denied.

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*[REPORTER'S NOTE: This opinion is reported as amended by order of the Court entered October 16, 1967, 389 U. S. 908.]

ALUMINUM CO. OF AMERICA ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS.

No. 1159. Decided June 5, 1967.

263 F. Supp. 480, affirmed.

Dickson R. Loos for appellants.

Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Robert W. Ginnane and *Leonard S. Goodman* for the United States et al. *Harry B. LaTourette* and *Robert H. Stahlheber* for rail carrier appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE HARLAN took no part in the consideration or decision of this case.

GILLS *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 1043, Misc. Decided June 5, 1967.

Certiorari granted; vacated and remanded.

Petitioner *pro se*.

Thomas C. Lynch, Attorney General of California, and *Edsel W. Haws* and *Daniel J. Kremer*, Deputy Attorneys General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Court of Appeal of California, Third Appellate District, for further consideration in light of *Chapman* v. *California*, 386 U. S. 18.

CAMODEO *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 1073, Misc. Decided June 5, 1967.

Certiorari granted; 367 F. 2d 146, vacated and remanded.

Petitioner *pro se.*

Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg and *Sidney M. Glazer* for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Anders* v. *California,* 386 U. S. 738.

MR. JUSTICE HARLAN, MR. JUSTICE STEWART, and MR. JUSTICE WHITE are of the opinion that certiorari should be denied.

REPORTER'S NOTE.

The next page is purposely numbered 901. The numbers between 575 and 901 were intentionally omitted, in order to make it possible to publish the orders in the current advance sheets or preliminary prints of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

ORDERS FROM MAY 15 THROUGH JUNE 5, 1967.

MAY 15, 1967.

Miscellaneous Orders.

No. ——. COLACASIDES *v.* MICHIGAN. Application for bail presented to MR. JUSTICE STEWART, and by him referred to the Court, denied. *Joseph W. Louisell* and *Ivan E. Barris* for applicant. *Frank J. Kelley,* Attorney General, and *Robert A. Derengoski,* Solicitor General, for the State of Michigan, in opposition.

No. 1169. ALITALIA-LINEE AEREE ITALIANE, S.P.A. *v.* LISI ET AL. C. A. 2d Cir. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 25. UNITED STATES *v.* ARNOLD, SCHWINN & Co. ET AL. Appeal from D. C. N. D. Ill. (Probable jurisdiction noted, 382 U. S. 936.) Motion of O. M. Scott & Sons Co. for leave to file a brief, as *amicus curiae,* denied. *Thomas A. Rothwell* on the motion. *Harold D. Burgess, Robert C. Keck* and *James G. Hiering* for Arnold, Schwinn & Co., and *Earl E. Pollock* for Schwinn Cycle Distributors Association in opposition to the motion.

No. 1521, Misc. THOMAS *v.* SUPREME COURT OF CALIFORNIA ET AL. Motion for leave to file petition for writ of mandamus and/or prohibition denied. Petitioner *pro se. Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Norman H. Kokolow,* Deputy Attorney General, for respondents.

No. 31, Original. UTAH *v.* UNITED STATES. Motion for leave to file bill of complaint granted and the United States allowed sixty days to answer. *Phil L. Hansen,* Attorney General of Utah, on the motion. *Solicitor General Marshall* for the United States.

No. 491. BOARD OF SUPERVISORS OF SUFFOLK COUNTY ET AL. *v.* BIANCHI ET AL. Appeal from D. C. E. D. N. Y. (Probable jurisdiction noted, 385 U. S. 966.) Motion of Arthur McComb for leave to file brief, as *amicus curiae,* denied.

No. 1342. FEDERAL POWER COMMISSION *v.* SKELLY OIL CO. ET AL. C. A. 10th Cir. Motion of petitioner to expedite proceedings denied at this time insofar as it requests that responses to petition of the Federal Power Commission for writ of certiorari and to the other petitions for writs of certiorari dealing with the same proceeding be filed by May 20, 1967, whether or not such responses are, under the Rules of this Court, due by that date. *Solicitor General Marshall* for petitioner on the motion. Briefs in opposition to the motion were filed by *Robert E. May* and *Louis Flax* for Sun Oil Co., and *Bruce R. Merrill, Joseph C. Johnson* and *Thomas H. Burton* for Continental Oil Co., *Cecil N. Cook* for Midhurst Oil Corp., *Murray Christian* and *H. W. Varner* for Superior Oil Co., and *Paul W. Hicks, Robert W. Henderson* and *Donald K. Young* for Hunt Oil Co. et al. Reported below: 375 F. 2d 6.

No. 1602, Misc. BAKER *v.* GEORGIA;

No. 1617, Misc. HUMPHREY *v.* FIELD, CALIFORNIA MENS COLONY SUPERINTENDENT; and

No. 1625, Misc. SANDEFUR *v.* KROPP, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1623, Misc. BRYANS *v.* UNITED STATES. C. A. 9th Cir. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for a writ of certiorari, certiorari denied.

No. 1631, Misc. DICKERSON *v.* KROPP, WARDEN. Sup. Ct. Mich. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for a writ of certiorari, certiorari denied.

No. 1543, Misc. GARRISON *v.* UNITED STATES; and
No. 1603, Misc. WILTSIE *v.* WILSON, WARDEN. Motions for leave to file petitions for writs of mandamus denied.

Probable Jurisdiction Noted. (See also No. 1088, *ante*, p. 94.)

No. 1109. INTERSTATE CIRCUIT, INC. *v.* CITY OF DALLAS; and

No. 1155. UNITED ARTISTS CORP. *v.* CITY OF DALLAS. Appeals from Ct. Civ. App. Tex., 5th Sup. Jud. Dist. Probable jurisdiction noted. Cases are consolidated and a total of two hours allotted for oral argument. *Grover Hartt, Jr.*, and *Edwin Tobolowsky* for appellant in No. 1109. *Paul Carrington* and *Dan McElroy* for appellant in No. 1155. *N. Alex Bickley* and *Ted P. MacMaster* for appellee in both cases. Reported below: 402 S. W. 2d 770.

Certiorari Granted. (See also No. 1116, *ante*, p. 96; No. 6, Misc., *ante*, p. 86; No. 710, Misc., *ante*, p. 90; No. 889, Misc., *ante*, p. 92; and No. 1059, Misc., *ante*, p. 91.)

No. 1157. CASE-SWAYNE CO., INC. *v.* SUNKIST GROWERS, INC. C. A. 9th Cir. Certiorari granted. *William H. Henderson* and *W. Glenn Harmon* for petitioner. *Charles E. Beardsley* and *Seth M. Hufstedler* for respondent. Reported below: 369 F. 2d 449.

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No. 1115. WIRTZ, SECRETARY OF LABOR *v.* LOCAL 153, GLASS BOTTLE BLOWERS ASSOCIATION OF THE UNITED STATES AND CANADA, AFL–CIO. C. A. 3d Cir. Certiorari granted. *Solicitor General Marshall, Assistant Attorney General Sanders, Nathan Lewin, Alan S. Rosenthal, Robert V. Zener* and *Charles Donahue, Edward D. Friedman* and *James R. Beaird* for petitioner. *Albert K. Plone* for respondent. Reported below: 372 F. 2d 86.

No. 1117. WIRTZ, SECRETARY OF LABOR *v.* LOCAL UNION No. 125, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL–CIO. C. A. 6th Cir. Certiorari granted and case set for oral argument immediately following No. 1115. *Solicitor General Marshall, Assistant Attorney General Sanders, Nathan Lewin, Alan S. Rosenthal, Robert V. Zener* and *Charles Donahue* for petitioner. *Mortimer Riemer* for respondent. Reported below: 375 F. 2d 921.

No. 956, Misc. SMITH *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *Gerald W. Getty, Marshall J. Hartman* and *James J. Doherty* for petitioner. *William G. Clark*, Attorney General of Illinois, for respondent. Reported below: 70 Ill. App. 2d 289, 217 N. E. 2d 546.

Certiorari Denied. (See also No. 1088, *ante*, p. 94; and Misc. Nos. 1623 and 1631, *supra.*)

No. 891. CORVALLIS SAND & GRAVEL CO. ET AL. *v.* HOISTING & PORTABLE ENGINEERS LOCAL UNION No. 701 ET AL. Sup. Ct. Ore. Certiorari denied. *James C. Dezendorf* for petitioners. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for the United States, as *amicus curiae*, in opposition. Reported below: 246 Ore. —, 419 P. 2d 38.

No. 768. SULLIVAN ET UX. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Edgar Shook* for petitioners. *Solicitor General Marshall* and *Assistant Attorney General Rogovin* for the United States. Reported below: 363 F. 2d 724.

No. 989. LAW MOTOR FREIGHT, INC., ET AL. *v.* CIVIL AERONAUTICS BOARD ET AL. C. A. 1st Cir. Certiorari denied. *Bryce Rea, Jr.*, and *Thomas M. Knebel* for petitioners. *Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Joseph B. Goldman, O. D. Ozment, Warren L. Sharfman* and *Robert L. Toomey* for Civil Aeronautics Board, and *George C. Neal* and *Brian C. Elmer* for Emery Air Freight Corp., respondents. Reported below: 364 F. 2d 139.

No. 1102. HAHN ET UX. *v.* BIHLMIRE. Sup. Ct. Wis. Certiorari denied. *George Stephen Leonard* for petitioners. *Irvin B. Charne* for respondent. Reported below: 31 Wis. 2d 537, 143 N. W. 2d 433.

No. 1206. 305 EAST 43D STREET CORP. *v.* KARLSON. C. A. 2d Cir. Certiorari denied. *Edmund F. Lamb* for petitioner. *Stuart M. Speiser* for respondent. Reported below: 370 F. 2d 467.

No. 1160. NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., ET AL. *v.* CIVIL AERONAUTICS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. *Bryce Rea, Jr., Thomas M. Knebel* and *Ronald R. Pentecost* for petitioners. *Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Joseph B. Goldman, O. D. Ozment, Warren L. Sharfman* and *Robert L. Toomey* for Civil Aeronautics Board, and *George C. Neal* and *Brian C. Elmer* for Emery Air Freight Corp., respondents. Reported below: 126 U. S. App. D. C. 52, 374 F. 2d 266.

No. 1104. SWINDLEHURST *v.* AMERICAN FIDELITY FIRE INSURANCE CO. ET AL. Sup. Ct. Mich. Certiorari denied. *H. Donald Bruce* for petitioner. *Fred Roland Allaben* for American Fidelity Fire Insurance Co., and *Stephen T. Roumell* for Sales, respondents.

No. 1180. ANDERSON ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *George D. Massar* for petitioners. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Robert N. Anderson* for respondent. Reported below: 371 F. 2d 59.

No. 1190. NUCCIO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jerome Lewis* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 373 F. 2d 168.

No. 1196. DATLOF *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Robert M. Taylor* for petitioner. *Solicitor General Marshall, Acting Assistant Attorney General Pugh* and *Robert H. Solomon* for the United States. Reported below: 370 F. 2d 655.

No. 1204. SHERMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Seymour Kanter* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 372 F. 2d 131.

No. 1200. MCFARLAND *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Maurice Edelbaum* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 371 F. 2d 701.

No. 1197. BRYANT-BUCKNER ASSOCIATES, INC. *v.* DANVILLE TOBACCO ASSOCIATION ET AL. C. A. 4th Cir. Certiorari denied. *Frederick Bernays Wiener* for petitioner. *Edwin B. Meade* for respondent Danville Tobacco Association, and *Earle Garrett, Jr., Allan Garrett, Earle Garrett III* and *G. Kenneth Miller* for respondent Producers Tobacco Co., Inc. Reported below: 372 F. 2d 634.

No. 1198. RELIANCE INSURANCE CO. *v.* BLOUNT BROTHERS CORP. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. *Edward Gallagher* for petitioner. *Douglas Arant* for respondent. Reported below: 370 F. 2d 733.

No. 1194. CHASE *v.* UNITED STATES. C. A. 4th Cir. Motion for leave to dispense with printing petition granted. Certiorari denied. *Louis Koutoulakos* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 372 F. 2d 453.

No. 1040. QUINAULT TRIBE OF INDIANS *v.* GALLAGHER, SHERIFF, ET AL. C. A. 9th Cir. Motion for leave to dispense with printing petition granted. Certiorari denied. *Charles A. Hobbs* for petitioner. *John J. O'Connell,* Attorney General of Washington, *pro se,* and *Jane Dowdle Smith,* Assistant Attorney General, for Gallagher et al., respondents. Briefs *amicus curiae,* in support of the petition, were filed by *James B. Hovis* for Confederated Tribes and Bands of Yakima Indian Nation, and *James J. McArdle* for Makah Indian Tribe. *Solicitor General Marshall, Assistant Attorney General Vinson, Nathan Lewin* and *Beatrice Rosenberg* filed a memorandum for the United States. Reported below: 368 F. 2d 648.

No. 1205. SPIVAK ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Myron L. Shapiro* for petitioners. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Crombie J. D. Garrett* for the United States. Reported below: 370 F. 2d 612.

No. 1207. LAWRENCE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *J. B. Tietz* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 370 F. 2d 388.

No. 1212. SYMONETTE SHIPYARDS, LTD. *v.* CLARK ET AL. C. A. 5th Cir. Certiorari denied. *W. F. Parker* for petitioner. *Arthur Roth, Charlotte J. Roth* and *Joseph S. Marcus* for respondents. Reported below: 365 F. 2d 464.

No. 1112. FOSTER *v.* LYKES BROS. STEAMSHIP CO., INC. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. *Charles R. Maloney* for petitioner. *William E. Wright* for respondent. Reported below: 368 F. 2d 326.

No. 1062. SCHMITZ ET AL. *v.* SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A., ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE CLARK and MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Daniel W. O'Donoghue* and *Ross O'Donoghue* for petitioners. *John J. Wilson* and *Frank H. Strickler* for Societe Internationale Pour Participations Industrielles et Commerciales, S. A., and *Solicitor General Marshall, Assistant Attorney General Sanders, Morton Hollander* and *Richard S. Salzman* for the Secretary of the Treasury, respondents.

No. 1275. CREDITORS' COMMITTEE OF DRIVE-IN DEVELOPMENT CORP. ET AL. *v.* NATIONAL BOULEVARD BANK OF CHICAGO. C. A. 7th Cir. Certiorari denied. *G. Kent Yowell* for petitioners. Reported below: 371 F. 2d 215.

No. 1210. SARFATY ET AL. *v.* NOWAK, MAYOR OF CALUMET CITY, ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. *John Powers Crowley* and *Anna R. Lavin* for petitioners. Reported below: 369 F. 2d 256.

No. 1132. FLORISTS' NATIONWIDE TELEPHONE DELIVERY NETWORK—AMERICA'S PHONE-ORDER FLORISTS, INC. *v.* FLORISTS' TELEGRAPH DELIVERY ASSOCIATION; and

No. 1248. FLORISTS' TELEGRAPH DELIVERY ASSOCIATION *v.* FLORISTS' NATIONWIDE TELEPHONE DELIVERY NETWORK—AMERICA'S PHONE-ORDER FLORISTS, INC. C. A. 7th Cir. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of these petitions. *Thomas C. McConnell* and *Francis J. McConnell* for petitioner in No. 1132 and for respondent in No. 1248. *Norman Diamond* and *Melville C. Williams* for petitioner in No. 1248 and for respondent in No. 1132. Reported below: 371 F. 2d 263.

No. 884, Misc. PETTIT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States.

No. 1201. PEPE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Hyman Bravin* and *Irving Anolik* for petitioner. *Frank S. Hogan* for respondent.

No. 1158. HURST *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Ellis G. Arnall* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 370 F. 2d 161; 371 F. 2d 1018.

No. 848, Misc. BOWERS *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Arlen Specter* for respondent. Reported below: 361 F. 2d 218.

No. 988, Misc. SCHIEBELHUT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 357 F. 2d 743.

No. 1170, Misc. DURHAM *v.* VIRGINIA. Cir. Ct., Frederick County, Va. Certiorari denied. *David G. Simpson* for petitioner. *Joseph A. Massie, Jr.*, for respondent.

No. 1431, Misc. VIDA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Jerome Goldman* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 370 F. 2d 759.

No. 1350, Misc. KING *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Richard M. Millman* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 125 U. S. App. D. C. 168, 369 F. 2d 213.

No. 1178, Misc. BELTOWSKI *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Petitioner *pro se*. *Douglas M. Head*, Attorney General of Minnesota, *George M. Scott* and *Henry W. McCarr, Jr.*, for respondent.

No. 1438, Misc. GARRISON *v.* LACEY ET AL. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for respondents.

No. 1473, Misc. CARTER *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 33 Wis. 2d 80, 146 N. W. 2d 466.

No. 1476, Misc. MCCONNELL *v.* PATTERSON, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 370 F. 2d 41.

No. 1477, Misc. DAVIDSON *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. *William C. Erbecker* for petitioner. Reported below: — Ind. —, —, 220 N. E. 2d 340, 221 N. E. 2d 814.

No. 1479, Misc. BLOOMER *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 197 Kan. 668, 421 P. 2d 58.

No. 1486, Misc. GORDON *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 1496, Misc. RIVERA *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1499, Misc. NIETO *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Caryl Warner* for petitioner. Reported below: 247 Cal. App. 2d 364, 55 Cal. Rptr. 546.

No. 1504, Misc. PLETCHER *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 371 F. 2d 549.

No. 1505, Misc. KUK *v.* WARDEN, NEVADA STATE PRISON. Sup. Ct. Nev. Certiorari denied. Reported below: — Nev. —, 423 P. 2d 675.

No. 1507, Misc. RODRIGUEZ *v.* DUNBAR, CORRECTIONS DIRECTOR, ET AL. C. A. 9th Cir. Certiorari denied.

No. 1508, Misc. HAINES *v.* FRYE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 1509, Misc. BELTOWSKI *v.* LARSON, JUDGE. C. A. 8th Cir. Certiorari denied.

No. 1511, Misc. CROSBY *v.* BRIERLEY, COUNTY SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 1513, Misc. SEITERLE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Earl Klein* for petitioner. Reported below: 65 Cal. 2d 333, 420 P. 2d 217.

No. 1518, Misc. HARDEMAN *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. *Melvin M. Belli* for petitioner. Reported below: 244 Cal. App. 2d 1, 53 Cal. Rptr. 168.

No. 1536, Misc. CHROMIAK *v.* FIELD, STATE INSTITUTION SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 1519, Misc. OVERSTREET *v.* SOUTHERN RAILWAY CO. C. A. 5th Cir. Certiorari denied. *W. S. Murphy* for petitioner. *Charles A. Horsky* and *M. M. Roberts* for respondent. Reported below: 371 F. 2d 411.

No. 1533, Misc. BEASLEY *v.* WILSON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 370 F. 2d 320.

No. 1535, Misc. PHELPS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 373 F. 2d 194.

No. 1538, Misc. PARRISH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *John J. Dwyer* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 372 F. 2d 453.

No. 1546, Misc. WILLIAMS *v.* OLIVER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1549, Misc. STILTNER *v.* RHAY, PENITENTIARY SUPERINTENDENT, ET AL. Sup. Ct. Wash. Certiorari denied.

No. 1560, Misc. GROLEAU *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States et al.

No. 1629, Misc. COWENS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 373 F. 2d 34.

No. 1569, Misc. STILTNER *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. Certiorari denied.

No. 1580, Misc. FODREY *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 1582, Misc. SCOTT *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Donald I. Strauber* for petitioner.

No. 1589, Misc. FITZGERALD *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied.

No. 823, Misc. BLESSING *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se*. *Frank J. Kelley*, Attorney General of Michigan, *Robert A. Derengoski*, Solicitor General, and *Curtis G. Beck*, Assistant Attorney General, for respondent. Reported below: 378 Mich. 51, 142 N. W. 2d 709.

No. 939, Misc. KUSHMER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 365 F. 2d 153.

No. 1080, Misc. SENK *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 423 Pa. 129, 223 A. 2d 97.

No. 1556, Misc. CASTRO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Leon B. Polsky* for petitioner. *Frank S. Hogan* for respondent. Reported below: 19 N. Y. 2d 14, 224 N. E. 2d 80.

No. 1487, Misc. MCSHANE ET AL. *v.* CLEAVER ET AL. Dist. Ct. App. Cal., 5th App. Dist. Certiorari and other relief denied.

Rehearing Denied.

No. 467, October Term, 1962. ALVADO ET AL. *v.* GENERAL MOTORS CORP. Motion for leave to file fifth petition for rehearing denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this motion. [See, *e. g.*, 384 U. S. 1028.]

No. 1091. OGLETREE ET AL. *v.* OHIO, 386 U. S. 1007;
No. 1092. FRANKLIN ET AL. *v.* MCDANIEL, 386 U. S. 993;
No. 275, Misc. SMITH *v.* OHIO, 386 U. S. 1008;
No. 1076, Misc. BJORNSEN *v.* LAVALLEE, WARDEN, 386 U. S. 998;
No. 1210, Misc. PITTMAN *v.* UNITED STATES, 386 U. S. 995;
No. 1247, Misc. EVERETT *v.* UNITED STATES, 386 U. S. 1013; and
No. 1439, Misc. SMITH *v.* WILSON, WARDEN, 386 U. S. 1002. Petitions for rehearing denied.

MAY 22, 1967.

Miscellaneous Orders.

No. ——. LEVY *v.* CORCORAN, U. S. DISTRICT JUDGE. Application for a stay presented to MR. CHIEF JUSTICE WARREN, and by him referred to the Court, denied. *Anthony G. Amsterdam* and *Charles Morgan, Jr.*, for applicant. *Solicitor General Marshall* for the United States in opposition.

No. 1298, Misc. OSBORN *v.* CALIFORNIA MENS COLONY SUPERINTENDENT. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *William E. James*, Assistant Attorney General, and *Jack K. Weber*, Deputy Attorney General, for respondent.

No. ——. WALLACE, GOVERNOR OF ALABAMA *v.* LEE ET AL. D. C. M. D. Ala. Application for a stay presented to MR. JUSTICE BLACK, and by him referred to the Court, denied. *MacDonald Gallion,* Attorney General of Alabama, *Gordon Madison,* Assistant Attorney General, *Nicholas S. Hare,* Special Assistant Attorney General, *John C. Satterfield* and *Maury Smith* for applicant. *Charles S. Ralston, Jack Greenberg, James M. Nabrit III* and *Fred D. Gray* for Lee et al., and *Solicitor General Marshall* and *Assistant Attorney General Doar* for the United States in opposition. Reported below: 267 F. Supp. 458.

No. 895. KATZ *v.* UNITED STATES. C. A. 9th Cir. (Certiorari granted, 386 U. S. 954.) Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. *Burton Marks* on the motion.

No. 1643, Misc. RIVERA *v.* GOVERNMENT OF THE VIRGIN ISLANDS; and

No. 1652, Misc. ALLEN *v.* RUSSELL, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1539, Misc. BOLES *v.* BURNETT, CHIEF JUSTICE. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

Certiorari Granted. (See also No. 274, *ante,* p. 237; No. 1003, *ante,* p. 231; No. 24, Misc., *ante,* p. 241; No. 33, Misc., *ante,* p. 242; No. 48, Misc., *ante,* p. 243; and No. 354, Misc., *ante,* p. 236.)

No. 1218. INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1291, ET AL. *v.* PHILADELPHIA MARINE TRADE ASSOCIATION. C. A. 3d Cir. Certiorari granted and case set for oral argument immediately following No. 892. *Abraham E. Freedman* and *Martin J. Vigderman* for petitioners. Reported below: 368 F. 2d 932.

Certiorari Denied. (See also No. 1174, *ante*, p. 235; No. 1182, *ante*, p. 235; and No. 1199, *ante*, p. 240.)

No. 1122. BROWN ET AL., DBA GEM DAIRY *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. *George Louis Creamer* for petitioners. *Solicitor General Marshall, Assistant Attorney General Sanders, Alan S. Rosenthal* and *Richard S. Salzman* for the United States et al. Reported below: 367 F. 2d 907.

No. 1124. BISSELL ET AL. *v.* MCELLIGOTT, ADMINISTRATOR, ET AL. C. A. 8th Cir. Certiorari denied. *Alan B. Slayton* for Bissell et al., and *Tom B. Kretsinger* for Gampher et al., petitioners. *Solicitor General Marshall* for respondent United States. Reported below: 369 F. 2d 115.

No. 1130. NOREN ET AL. *v.* MCCARTHY, MANAGER OF UNITED STATES LAND OFFICE. C. A. 9th Cir. Certiorari denied. *Edson Abel* for petitioners. *Solicitor General Marshall, Assistant Attorney General Weisl* and *Roger P. Marquis* for respondent. Reported below: 370 F. 2d 845.

No. 1150. GOODMAN *v.* UNITED STATES;

No. 1151. COHEN *v.* UNITED STATES; and

No. 1152. COUGHLIN *v.* UNITED STATES. Ct. Cl. Certiorari denied. *E. Barrett Prettyman, Jr.*, and *James E. Murray* for petitioners in all three cases. *Solicitor General Marshall, Assistant Attorney General Sanders, Morton Hollander* and *John C. Eldridge* for the United States in all three cases. *Elmer Neumann* for American Federation of Government Employees, as *amicus curiae*, in support of the petitions in all three cases. Reported below: 177 Ct. Cl. 599, 369 F. 2d 976.

No. 1220. DELFINO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 1173. STILL ET AL. *v.* ROSSVILLE CRUSHED STONE CO., INC. C. A. 6th Cir. Certiorari denied. *Joe Timberlake* for petitioners. *Frank M. Gleason* for respondent. Reported below: 370 F. 2d 324.

No. 1214. STRATHMORE SECURITIES, INC., ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. D. C. Cir. Certiorari denied. *Maurice J. Mahoney* for petitioners. *Solicitor General Marshall, Philip A. Loomis, Jr.*, and *Walter P. North* for respondent.

No. 1215. BABCOCK ET UX. *v.* PHILLIPS. C. A. 10th Cir. Certiorari denied. *Gene W. Reardon* for petitioners. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Harry Baum* for respondent. Reported below: 372 F. 2d 240.

No. 1219. BEALL PIPE & TANK CORP. *v.* SHELL OIL CO. C. A. 9th Cir. Certiorari denied. *Kenneth E. Roberts* for petitioner. *Arden E. Shenker* for respondent. Reported below: 370 F. 2d 742.

No. 1222. GARY AIRCRAFT CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *L. G. Clinton, Jr.*, for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 368 F. 2d 223.

No. 1225. COLSON CORP. *v.* EVEREST & JENNINGS, INC., ET AL. C. A. 7th Cir. Certiorari denied. *Barry L. Kroll* for petitioner. *Allan D. Mockabee* for respondents. Reported below: 371 F. 2d 240.

No. 1226. MALLON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Robert V. Blade* for petitioners. *Solicitor General Marshall* for the United States.

No. 1228. TOOL RESEARCH & ENGINEERING CORP. *v.* HONCOR CORP. C. A. 9th Cir. Certiorari denied. *Sidney Dorfman* for petitioner. *Wm. Douglas Sellers* for respondent. Reported below: 367 F. 2d 449.

No. 1232. HELLAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Porter B. Byrum* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 372 F. 2d 780.

No. 1235. MARTIN ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Richard E. Gorman* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 372 F. 2d 63.

No. 1237. CORSON ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Robert M. Taylor* for petitioners. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Joseph M. Howard* for respondent. Reported below: 369 F. 2d 367.

No. 1239. JACKSON COUNTY PUBLIC WATER SUPPLY DISTRICT, No. 1 *v.* ONG AIRCRAFT CORP. ET AL. K. C. Ct. App. Mo. Certiorari denied. *Albert Thomson* for petitioner. *Roy P. Swanson* for respondent Ong Aircraft Corp. Reported below: 409 S. W. 2d 226.

No. 1244. ROCCO *v.* LIFE MAGAZINE ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Petitioner *pro se*. *Homer I. Mitchell* and *Harold R. Medina, Jr.*, for respondents.

No. 1200, Misc. FRANKLIN *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

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No. 1247. STEVENS *v.* FRICK. C. A. 2d Cir. Certiorari denied. *Simon H. Rifkind* for petitioner. *David B. Buerger* for respondent. Reported below: 372 F. 2d 378.

No. 1256. DULAINE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 371 F. 2d 824.

No. 1264. O'BRIEN ET AL. *v.* GREAT NORTHERN RAILWAY CO. ET AL. Sup. Ct. Mont. Certiorari denied. *Alfred B. Coate* for petitioners. *Edwin S. Booth* for respondents. Reported below: —— Mont. ——, 421 P. 2d 710.

No. 1267. SCOLERI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Frank G. Whalen* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 374 F. 2d 859.

No. 1288. ARROYO *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. *Nathan T. Notkin* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondent.

No. 1221, Misc. VELASQUEZ *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. Certiorari denied. Petitioner *pro se*. *John J. O'Connell*, Attorney General of Washington, and *Stephen C. Way* and *Lee D. Rickabaugh*, Assistant Attorneys General, for respondent.

No. 1230, Misc. HERRINGTON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1069, Misc. TIVEY *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. Certiorari denied. Petitioner *pro se.* *John J. O'Connell,* Attorney General of Washington, and *Stephen C. Way* and *Lee D. Rickabaugh,* Assistant Attorneys General, for respondent.

No. 1217. INTERNATIONAL RAILWAYS OF CENTRAL AMERICA *v.* UNITED FRUIT CO.; and

No. 1320. UNITED FRUIT CO. *v.* INTERNATIONAL RAILWAYS OF CENTRAL AMERICA. C. A. 2d Cir. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of these petitions. *Aaron Lewittes* for petitioner in No. 1217 and for respondent in No. 1320. *Ralph M. Carson* for petitioner in No. 1320 and for respondent in No. 1217. Reported below: 373 F. 2d 408.

No. 378. WATERMAN STEAMSHIP CORP. *v.* SKIBINSKI. C. A. 2d Cir. Motions of American Merchant Marine Institute, Inc., and American Trial Lawyers Association for leave to file briefs, as *amici curiae,* granted. Certiorari denied. *Sidney A. Schwartz* for petitioner. *William A. Blank* and *Wilfred L. Davis* for respondent. *Cornelius P. Coughlan* for American Merchant Marine Institute, Inc., as *amicus curiae,* in support of the petition. *Arthur J. Mandell* for American Trial Lawyers Association, as *amicus curiae,* in opposition to the petition. Reported below: 360 F. 2d 539.

No. 1344, Misc. ENGLISH *v.* TENNESSEE; and

No. 1502, Misc. GRANT *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Petitioners *pro se.* *George F. McCanless,* Attorney General of Tennessee, and *Edgar P. Calhoun,* Assistant Attorney General, for respondent in No. 1344, Misc. Reported below: — Tenn. —, —, 411 S. W. 2d 702.

No. 1330. GRACE LINE, INC., ET AL. *v.* SCOPAZ ET AL. C. A. 2d Cir. Certiorari denied. *Louis J. Gusmano* for petitioners. *Chester A. Hahn* for respondents. Reported below: 372 F. 2d 403.

No. 1279, Misc. LAWRENCE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *William E. James*, Assistant Attorney General, and *Bradley A. Stoutt*, Deputy Attorney General, for respondent.

No. 1300, Misc. MILES *v.* OLIVER, WARDEN. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *Doris H. Maier*, Assistant Attorney General, and *Nelson P. Kempsky*, Deputy Attorney General, for respondent.

No. 1308, Misc. STILTNER *v.* WASHINGTON ET AL. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *John J. O'Connell*, Attorney General of Washington, and *Stephen C. Way*, Assistant Attorney General, for respondents. Reported below: 371 F. 2d 420.

No. 1348, Misc. PINO *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 125 U. S. App. D. C. 225, 370 F. 2d 247.

No. 1458, Misc. KILPATRICK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Richard D. Andrews* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 372 F. 2d 93.

No. 1353, Misc. CHEELY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 367 F. 2d 547.

No. 1320, Misc. SHEPPARD *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. *George Howard, Jr.*, for petitioner. *Joe Purcell*, Attorney General of Arkansas, for respondent.

No. 1389, Misc. HANKINS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 1399, Misc. HARRELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *John J. Cleary* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 371 F. 2d 160.

No. 1429, Misc. WEIYMANN ET AL. *v.* ALLGOOD, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 367 F. 2d 394.

No. 1471, Misc. HALL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 372 F. 2d 603.

No. 1489, Misc. SHIPP *v.* CITY OF TOLEDO. Sup. Ct. Ohio. Certiorari denied. Petitioner *pro se*. *John J. Burkhart* for respondent.

No. 1526, Misc. MANNING *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 371 F. 2d 811.

No. 1520, Misc. SCHILDHAUS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Spritzer, Acting Assistant Attorney General Pugh* and *Robert N. Anderson* for respondent. Reported below: 370 F. 2d 549.

No. 1537, Misc. NADILE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1540, Misc. KINNETT *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. *Robert D. Simmons* for petitioner. Reported below: 408 S. W. 2d 417.

No. 1541, Misc. NELSON *v.* MILLER, CAPTAIN, UNITED STATES NAVY, ET AL. C. A. 3d Cir. Certiorari denied. *James J. Orlow* for petitioner. *Solicitor General Marshall* for respondents. Reported below: 373 F. 2d 474.

No. 1544, Misc. ROHDE *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Petitioner *pro se*. *George Van Hoomissen* and *Jacob B. Tanzer* for respondent. Reported below: 245 Ore. 593, 421 P. 2d 690.

No. 1552, Misc. SUMPTER *v.* CITY OF CLEVELAND. Sup. Ct. Ohio. Certiorari denied. *Frank C. Lyons* and *Alexander H. Martin, Jr.*, for petitioner. *Donald J. Guittar* for respondent.

No. 1655, Misc. FARGO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1563, Misc. BROWN *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. *Max Cohen* for petitioner. *John J. Dillon,* Attorney General of Indiana, and *Douglas B. McFadden,* Deputy Attorney General, for respondent. Reported below: — Ind. —, 221 N. E. 2d 676.

No. 1567, Misc. ABNEY *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 244 Md. 444, 223 A. 2d 792.

No. 1568, Misc. MCINTOSH *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Petitioner *pro se.* *Melvin G. Rueger* and *Calvin W. Prem* for respondent.

No. 1620, Misc. GONZALES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *John J. Browne* for petitioner. Reported below: 410 S. W. 2d 435.

No. 1634, Misc. DORADO *v.* CALIFORNIA ADULT AUTHORITY ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 1656, Misc. STILTNER *v.* WASHINGTON STATE BOARD OF PRISON TERMS AND PAROLES. C. A. 9th Cir. Certiorari denied.

No. 1591, Misc. HAWKS *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 370 F. 2d 123.

No. 999, Misc. CANADA *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se.* *Darrell F. Smith,* Attorney General of Arizona, and *James S. Tegart,* Assistant Attorney General, for respondent.

No. 1665, Misc. SCHACK *v.* FLORIDA. C. A. 5th Cir. Certiorari denied.

No. 1590, Misc. WENDELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *John G. Clancy* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 370 F. 2d 472.

No. 1361, Misc. WHITTLESEY ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Motion for leave to file amended petition granted. Certiorari denied. *Frank D. Reeves* and *Herbert O. Reid, Sr.*, for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

Rehearing Denied.

No. 110. NATIONAL WOODWORK MANUFACTURERS ASSOCIATION ET AL. *v.* NATIONAL LABOR RELATIONS BOARD, 386 U. S. 612;

No. 111. NATIONAL LABOR RELATIONS BOARD *v.* NATIONAL WOODWORK MANUFACTURERS ASSOCIATION ET AL., 386 U. S. 612;

No. 646. INDIANA & MICHIGAN ELECTRIC CO. *v.* FEDERAL POWER COMMISSION, 385 U. S. 972;

No. 1019. BERMAN *v.* BOARD OF ELECTIONS, CITY OF NEW YORK, ET AL., 386 U. S. 481;

No. 1034. STEWART ET AL. *v.* INDUSTRIAL COMMISSION OF ILLINOIS ET AL., 386 U. S. 683;

No. 1075. STICKLER *v.* TEHAN, SHERIFF, 386 U. S. 992;

No. 1409, Misc. ANDERSON *v.* UNITED STATES, 386 U. S. 1025. Petitions for rehearing denied.

No. 1014. WALKER *v.* ARKANSAS, 386 U. S. 682. Motion to present oral argument in support of rehearing and petition for rehearing denied.

MAY 25, 1967.

Dismissal Under Rule 60.

No. 1420, Misc. MCVAIL *v.* CAVELL, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court.

MAY 29, 1967.

Miscellaneous Orders.

No. —. IN RE SHOTT. It is ordered that Edgar I. Shott, Jr., of Cincinnati, Ohio, be permitted to resign voluntarily from the Bar of this Court. It is further ordered that his name be stricken from the roll of attorneys admitted to practice in this Court.

No. —. PIERCE *v.* PINTO, PRISON FARM SUPERINTENDENT. Application for bail denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 371. CROWN COAT FRONT CO., INC. *v.* UNITED STATES, 386 U. S. 503. Motion for allowance of costs denied. *Edwin J. McDermott* for petitioner. *Solicitor General Marshall* for the United States in opposition.

No. 1308. OBER ET AL. *v.* NAGY ET AL. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 1820, Misc. IN RE DISBARMENT OF QUIMBY. It is ordered that Charles H. Quimby III of Washington, District of Columbia, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 1679, Misc. GAUZE *v.* OLIVER, WARDEN, ET AL.;
No. 1684, Misc. KEY *v.* ARIZONA ET AL.; and
No. 1697, Misc. GREENLEE *v.* CALIFORNIA. Motions for leave to file petitions for writs of habeas corpus denied. Treating the papers submitted as petitions for writs of certiorari, certiorari denied.

No. 1605, Misc. POPE *v.* PARKER, WARDEN, ET AL.;
No. 1653, Misc. LEWIS *v.* ILLINOIS ET AL.; and
No. 1670, Misc. HUDSON *v.* TEXAS ET AL. Motions for leave to file petitions for writs of mandamus denied.

No. 1677, Misc. SKOLNICK *v.* FEDERAL CIRCUIT JUDGES OF SEVENTH JUDICIAL CIRCUIT; and
No. 1678, Misc. SKOLNICK *v.* CUMMINGS ET AL. Motions for leave to file petitions for writs of mandamus and/or prohibition denied.

No. 1604, Misc. MORGAN *v.* UNITED STATES. Motion for leave to file petition for writ of prohibition and/or mandamus denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Rogovin, Joseph M. Howard* and *John P. Burke* for the United States in opposition.

Probable Jurisdiction Noted.

No. 1208. LEE, CORRECTIONS COMMISSIONER, ET AL. *v.* WASHINGTON ET AL. Appeal from D. C. M. D. Ala. Probable jurisdiction noted. *MacDonald Gallion*, Attorney General of Alabama, *Gordon Madison*, Assistant Attorney General, *Nicholas S. Hare*, Special Assistant Attorney General, for Lee et al., and *J. M. Breckenridge* for Austin, appellants. *Charles Morgan, Jr.*, for appellees. Reported below: 263 F. Supp. 327.

No. 1236. UNITED STATES *v.* JACKSON ET AL. Appeal from D. C. Conn. Probable jurisdiction noted. *Solicitor General Marshall, Assistant Attorney General Vinson, Robert S. Rifkind, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 262 F. Supp. 716.

Certiorari Granted. (See also Nos. 43 and 64, *ante*, p. 425.)

No. 952. PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC. *v.* ANDERSON, TRUSTEE IN BANKRUPTCY. C. A. 5th Cir. Certiorari granted. *Irwin L. Langbein* for petitioner. *William P. Simmons, Jr.*, for respondent. *Solicitor General Marshall, Daniel M. Friedman, Philip A. Loomis, Jr., David Ferber, Paul Gonson* and *Robert W. Cox* filed a memorandum for the Securities and Exchange Commission. Reported below: 364 F. 2d 936.

No. 1161. TERRY ET AL. *v.* OHIO. Sup. Ct. Ohio. Certiorari granted and case set for oral argument immediately following No. 1192. *Jack G. Day* for petitioners. *John T. Corrigan* for respondent. *Bernard A. Berkman* for American Civil Liberties Union of Ohio, as *amicus curiae*, in support of the petition.

Certiorari Denied. (See also No. 1557, Misc., *ante*, p. 423; No. 1565, Misc., *ante*, p. 424; No. 1572, Misc., *ante*, p. 426; and No. 1606, Misc., *ante*, p. 425; and Misc. Nos. 1679, 1684 and 1697, *supra*.)

No. 1153. KYER *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Warren E. Magee* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 177 Ct. Cl. 747, 369 F. 2d 714.

No. 1120. BEIGEL *v.* UNITED STATES; and

No. 1254. LAPI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Eugene Feldman* for petitioner in No. 1120. *Frank A. Lopez* for petitioner in No. 1254. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States in both cases. Reported below: 370 F. 2d 751.

No. 1240. CREAM CREST-BLANDING DAIRIES, INC. *v.* NATIONAL DAIRY PRODUCTS CORP. C. A. 6th Cir. Certiorari denied. *Douglas K. Reading* for petitioner. *Gordon B. Wheeler* for respondent. Reported below: 370 F. 2d 332.

No. 1242. GREEN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 1243. JACKSON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1245. WAX *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. *Charles A. Bellows* for petitioner. Reported below: 75 Ill. App. 2d 163, 220 N. E. 2d 600.

No. 1249. BOARD OF TRANSPORTATION OF NEW CASTLE COUNTY *v.* CIVIL AERONAUTICS BOARD. C. A. D. C. Cir. Certiorari denied. *Robert M. Beckman* for petitioner. *Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Joseph B. Goldman, O. D. Ozment, Warren L. Sharfman* and *Frederic D. Houghteling* for respondent. Reported below: 125 U. S. App. D. C. 268, 371 F. 2d 733.

No. 1260. MACK TRUCKS, INC. *v.* BENDIX-WESTINGHOUSE AUTOMOTIVE AIR BRAKE CO. ET AL. C. A. 3d Cir. Certiorari denied. *Joseph B. Bagley* for petitioner. Reported below: 372 F. 2d 18.

No. 1250. AMERICAN GUILD OF VARIETY ARTISTS *v.* SMITH, DBA SMITH ENTERTAINMENT AGENCY ET AL. C. A. 8th Cir. Certiorari denied. *Albert F. Kimball* for petitioner. *Jerome G. Raidt* for respondent. Reported below: 368 F. 2d 511.

No. 1252. FAGER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. *Robert W. Jones* for petitioner.

No. 1261. RIMERMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Joseph S. Rosenthal* and *Allen Surinsky* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 374 F. 2d 251.

No. 1262. WILCOX ET AL. *v.* TRANSAMERICAN FREIGHT LINES, INC. C. A. 6th Cir. Certiorari denied. *Jack B. Josselson* for petitioners. *Ambrose H. Lindhorst* for respondent. Reported below: 371 F. 2d 403.

No. 1263. PUBLIC SERVICE CO. OF INDIANA, INC. *v.* FEDERAL POWER COMMISSION. C. A. 7th Cir. Certiorari denied. *Cameron F. MacRae* for petitioner. *Solicitor General Marshall, Richard A. Solomon, Peter H. Schiff, Drexel D. Journey* and *Israel Convisser* for respondent. Reported below: 375 F. 2d 100.

No. 1268. BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT DISTRICT NO. 89, ET AL. *v.* DOWELL ET AL. C. A. 10th Cir. Certiorari denied. *Coleman Hayes* for petitioners. *Jack Greenberg, James M. Nabrit III* and *U. Simpson Tate* for respondents. Reported below: 375 F. 2d 158.

No. 1310. KIBBY ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Gerald L. Seegers* for petitioners. *Solicitor General Marshall* for the United States. Reported below: 372 F. 2d 598.

No. 1285. GROENDYKE TRANSPORT, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 10th Cir. Certiorari denied. *Peter H. Ratner* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent National Labor Relations Board. Reported below: 372 F. 2d 137.

No. 1340. SUNKIST GROWERS, INC. *v.* CASE-SWAYNE CO., INC. C. A. 9th Cir. Certiorari denied. *Charles E. Beardsley* and *Seth M. Hufstedler* for petitioner. *William H. Henderson* and *W. Glenn Harmon* for respondent. Reported below: 369 F. 2d 449.

No. 1105. MCBRIDE *v.* SMITH, COMMANDANT, UNITED STATES COAST GUARD. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted. *Melvin L. Wulf* and *Marvin M. Karpatkin* for petitioner. *Solicitor General Marshall, Assistant Attorney General Yeagley, Kevin T. Maroney* and *Lee B. Anderson* for respondent. Reported below: 369 F. 2d 65.

No. 1253. TOLAN *v.* UNITED STATES. C. A. 9th Cir. Motion to dispense with printing petition granted. Certiorari denied. *Finton J. Phelan, Jr.,* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 370 F. 2d 799.

No. 1272. GREEN STREET ASSOCIATION ET AL. *v.* DALEY ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Richard F. Watt* for petitioners. *Raymond F. Simon* for Daley et al., and *Solicitor General Marshall* for Weaver et al., respondents. Reported below: 373 F. 2d 1.

No. 1324. MASTINI *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Henry R. Ashton* for respondents. Reported below: 369 F. 2d 378.

No. 1386. POWELL ET AL. *v.* MCCORMACK ET AL. C. A. D. C. Cir. Motion for leave to file supplement to petition granted. Motion of American Civil Liberties Union et al. for leave to file a brief, as *amici curiae*, granted. Motion of Congress for Racial Equality for leave to file a brief, as *amicus curiae*, granted. Motion of Harlem Lawyers Association, Inc., for leave to file a brief, as *amicus curiae*, granted. Motion of National Bar Association for leave to file a brief, as *amicus curiae*, granted. Motion of New York City Chapter of National Lawyers Guild for leave to file a brief, as *amicus curiae*, granted. Certiorari to the United States Court of Appeals for the District of Columbia Circuit, prior to the judgment, denied. *Arthur Kinoy, William M. Kunstler, Jean Camper Cahn, Robert L. Carter, Hubert T. Delany, Herbert O. Reid, Sr., Frank D. Reeves* and *Henry R. Williams* for petitioners. *Bruce Bromley, John R. Hupper, Thomas D. Barr, Victor M. Earle III, Lloyd N. Cutler, John H. Pickering, Louis F. Oberdorfer, Max O. Truitt, Jr.*, and *Timothy B. Dyk* for respondents. Briefs of *amici curiae*, in support of the petition, were filed by *Louis J. Lefkowitz*, Attorney General of New York, *pro se; J. Lee Rankin*, Corporation Counsel of the City of New York, *pro se; Ernest Angell, Osmond K. Fraenkel, Edward J. Ennis, Marvin M. Karpatkin, Lawrence Speiser* and *Joseph B. Robison* for American Civil Liberties Union et al.; *Floyd McKissick* for Congress of Racial Equality; *Frederick E. Samuel* for Harlem Lawyers Association, Inc.; *Revius Ortique* for National Bar Association; and *Ralph Shapiro* and *David M. Freedman* for New York City Chapter of National Lawyers Guild.

No. 1313. PERTH AMBOY DRY DOCK CO. *v.* HANSEN. Sup. Ct. N. J. Certiorari denied. *Isidor Kalisch* for petitioner. Reported below: 48 N. J. 389, 226 A. 2d 4.

No. 1212, Misc. RASCON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, and *Edsel W. Haws* and *Raymond M. Momboisse*, Deputy Attorneys General, for respondent.

No. 1213, Misc. MISTRETTA *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz*, Attorney General of New York, and *Murray Sylvester*, Assistant Attorney General, for respondent.

No. 1245, Misc. KIMMONS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Petitioner *pro se*. *Earl Faircloth*, Attorney General of Florida, and *George R. Georgieff*, Assistant Attorney General, for respondent. Reported below: 190 So. 2d 308.

No. 1355, Misc. FULWOOD *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *John H. Myers* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 125 U. S. App. D. C. 183, 369 F. 2d 960.

No. 1367, Misc. HORTON *v.* NEW YORK; and

No. 1386, Misc. ALVAREZ *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Rolon W. Reed* and *Leon B. Polsky* for petitioner in No. 1367, Misc. *Patrick M. Wall* for petitioner in No. 1386, Misc. *Frank S. Hogan* for respondent in both cases. Reported below: 18 N. Y. 2d 355, 221 N. E. 2d 909; 19 N. Y. 2d 600, 224 N. E. 2d 884.

No. 1311, Misc. RANDEL *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. *Tom Martin Davis, Jr.*, for petitioner. *Crawford C. Martin*, Attorney General of Texas, and *R. L. Lattimore* and *Howard M. Fender*, Assistant Attorneys General, for respondent.

No. 1319, Misc. HAYES, AKA HASAN *v.* HENDRICK, COUNTY PRISONS SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Arlen Specter* for respondent.

No. 1411, Misc. LIPKA, ADMINISTRATRIX, ET AL. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. *George S. Lettko* for petitioner Lipka et al. *Acting Solicitor General Spritzer, Assistant Attorney General Sanders, Alan S. Rosenthal* and *Martin Jacobs* for the United States. Reported below: 369 F. 2d 288.

No. 1452, Misc. MILLS *v.* CICCONE, WARDEN. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for respondent.

No. 1456, Misc. CHOPPING *v.* FIRST NATIONAL BANK OF LANDER. Sup. Ct. Wyo. Certiorari denied. *John J. Spriggs, Sr.*, and *John J. Spriggs, Jr.*, for petitioner. Reported below: 419 P. 2d 710.

No. 1457, Misc. GINGER *v.* CIRCUIT COURT FOR THE COUNTY OF WAYNE ET AL. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Aloysius J. Suchy* and *George H. Cross* for Circuit Court for the County of Wayne et al., and *Peter P. Gilbert* for State Bar of Michigan et al., respondents. Reported below: 372 F. 2d 620, 621.

No. 1468, Misc. FAUSTIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 371 F. 2d 820.

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No. 1470, Misc. VERZINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Joseph I. Stone* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 370 F. 2d 751.

No. 1561, Misc. CHARLTON ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Dale M. Quillen* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 372 F. 2d 663.

No. 1575, Misc. WACKER *v.* BISSON, CONSUL GENERAL, DOMINION OF CANADA. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *M. Hepburn Many* for respondent. Reported below: 370 F. 2d 552.

No. 1584, Misc. POULSON *v.* TURNER, WARDEN. Sup. Ct. Utah. Certiorari denied. *William G. Fowler* for petitioner.

No. 1585, Misc. FLETCHER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Petitioner *pro se*. *Michael F. Dillon* for respondent.

No. 1586, Misc. BURNSIDE *v.* SIGLER, WARDEN. Sup. Ct. Neb. Certiorari denied.

No. 1587, Misc. RODES *v.* RODES. Ct. App. N. Y. Certiorari denied.

No. 1597, Misc. BLANCHARD, DBA INFERNO CO. *v.* TEXSTEAM CORP. ET AL. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *J. V. Martin* and *A. H. Evans* for Texsteam Corp., and *Ned L. Conley* for Schoenfeld, respondents. Reported below: 352 F. 2d 983.

No. 1598, Misc. WARD *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1599, Misc. FAIR *v.* FLORIDA. C. A. 5th Cir. Certiorari denied.

No. 1600, Misc. GILMORE *v.* REAGAN ET AL. Sup. Ct. Cal. Certiorari denied.

No. 1601, Misc. HARDEN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1608, Misc. TROGLIO *v.* SHERWIN-WILLIAMS CO. C. A. 3d Cir. Certiorari denied. Petitioner *pro se.* *Irving Olds Murphy* for respondent. Reported below: 369 F. 2d 695.

No. 1611, Misc. MORGAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Marshall, Assistant Attorney General Rogovin, Joseph M. Howard* and *John P. Burke* for the United States.

No. 1616, Misc. BROWN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 1630, Misc. HUSKEY *v.* YANKWICH, U. S. DISTRICT JUDGE. C. A. 9th Cir. Certiorari denied.

No. 1698, Misc. BARNES *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Sup. Ct. Fla. Certiorari denied.

No. 1495, Misc. ALFORD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Leon B. Polsky* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 373 F. 2d 508.

Rehearing Denied.

No. 206. HOUSTON INSULATION CONTRACTORS ASSOCIATION *v.* NATIONAL LABOR RELATIONS BOARD, 386 U. S. 664;

No. 413. NATIONAL LABOR RELATIONS BOARD *v.* HOUSTON INSULATION CONTRACTORS ASSOCIATION, 386 U. S. 664;

No. 981. FELBER *v.* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, 386 U. S. 1005;

No. 1049. DACEY ET AL. *v.* GRIEVANCE COMMITTEE OF THE BAR OF FAIRFIELD COUNTY, 386 U. S. 683;

No. 1067. MILLER BREWING CO. *v.* JONES, DIRECTOR OF REVENUE OF ILLINOIS, 386 U. S. 684;

No. 1101. EVANSON ET AL. *v.* NORTHWEST HOLDING CO., 386 U. S. 1004; and

No. 1126. WASHINGTON *v.* GOLDEN STATE MUTUAL LIFE INSURANCE CO., 386 U. S. 1007. Petitions for rehearing denied.

No. 711. FORSTER MFG. CO., INC., ET AL. *v.* FEDERAL TRADE COMMISSION, 385 U. S. 1003. Motion for leave to file petition for rehearing denied.

No. 1359, Misc. SKOLNICK *v.* ROBSON, U. S. DISTRICT JUDGE, 386 U. S. 1002;

No. 1362, Misc. HONEA *v.* FLORIDA, 386 U. S. 1012;

No. 1372, Misc. TKACZYK ET AL. *v.* GALLAGHER ET AL., 386 U. S. 1013;

No. 1393, Misc. KROHN *v.* CHASE MANHATTAN BANK, 386 U. S. 1023;

No. 1400, Misc. SARTAIN *v.* PITCHESS, SHERIFF, 386 U. S. 1025;

No. 1408, Misc. CAREY *v.* GEORGE WASHINGTON UNIVERSITY, 386 U. S. 1013; and

No. 1410, Misc. FOGGY *v.* ARIZONA, 386 U. S. 1025. Petitions for rehearing denied.

No. 1004, Misc. JACQUEZ *v.* WILSON, WARDEN, 386 U. S. 1009; and

No. 1310, Misc. PRICE *v.* ALLGOOD, WARDEN, 386 U. S. 998. Motions for leave to file petitions for rehearing denied.

JUNE 5, 1967.

Miscellaneous Orders.

No. 29, Original. TEXAS ET AL. *v.* COLORADO. This case is held without action on the motion for leave to file a bill of complaint until October 16, 1967, or further order of the Court.

No. 83. UNITED STATES *v.* ROBEL. D. C. W. D. Wash. Case is restored to the calendar for reargument and counsel are directed to brief and argue, in addition to the questions presented, the question whether the delegation of authority to the Secretary of Defense to designate "defense facilities" satisfies pertinent constitutional standards. [For earlier order herein, see 384 U. S. 937.]

No. 1119. BANKS *v.* CHICAGO GRAIN TRIMMERS ASSOCIATION, INC., ET AL. C. A. 7th Cir. The Solicitor General is invited to file a further brief expressing the views of the United States in light of Title 33 U. S. C. § 933 (g). [For earlier order herein, see 386 U. S. 1002.]

No. 1624, Misc. WILLIAMS *v.* WILSON, WARDEN; and

No. 1736, Misc. WELSH *v.* CALIFORNIA ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1752, Misc. LESER *v.* UNITED STATES. Motion for leave to file petition for writ of habeas corpus and other relief denied.

No. 1346, Misc. IN RE DISBARMENT OF REKEWEG. It having been reported to the Court that Wilmer D. Rekeweg, of Paulding, State of Ohio, has been disbarred from the practice of law in all of the courts of the State of Ohio by judgment of the Supreme Court of Ohio, duly entered on the 27th day of April, 1966, and this Court by order of February 13, 1967, having suspended the said Wilmer D. Rekeweg from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent, who has filed a return thereto; now, upon consideration of the rule to show cause and the return aforesaid;

It is ordered that the said Wilmer D. Rekeweg be, and he is hereby, disbarred, and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. 1845, Misc. IN RE DISBARMENT OF LOMBARD. It is ordered that Earl J. Lombard, of Washington, District of Columbia, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 1846, Misc. IN RE DISBARMENT OF MCCULLOUGH. It is ordered that James M. McCullough, of Chevy Chase, State of Maryland, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 1607, Misc. IN RE WHITTINGTON. Ct. App. Ohio, Fairfield County. Motion for stay of execution and other relief denied. *Judson C. Kistler* on the motion.

No. 1738, Misc. GREEN *v.* HOOEY, JUDGE, ET AL. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted. (See also No. 513, *ante*, p. 572; No. 1043, Misc., *ante*, p. 574; No. 1073, Misc., *ante*, p. 575; and No. 1144, Misc., *ante*, p. 571.)

No. 1301. TCHEREPNIN ET AL. *v.* KNIGHT ET AL. C. A. 7th Cir. Certiorari granted. *Arnold I. Shure, Anthony Bradley Eben* and *Robert A. Sprecher* for petitioners. *Albert E. Jenner, Jr., Charles J. O'Laughlin* for respondents City Savings Association et al., and *William G. Clark*, Attorney General of Illinois, for respondents Knight et al. *Solicitor General Marshall, Philip A. Loomis, Jr., David Ferber, Edward B. Wagner* and *Richard E. Nathan* for the Securities and Exchange Commission, as *amicus curiae*, in support of the petition. Reported below: 371 F. 2d 374.

Certiorari Denied. (See also No. 1579, Misc., *ante*, p. 571.)

No. 488. UNITED STATES *v.* CITIZENS NATIONAL BANK OF EVANSVILLE, EXECUTOR. C. A. 7th Cir. Certiorari denied. *Solicitor General Marshall, Jack S. Levin, Robert N. Anderson, Morton K. Rothschild* and *Albert J. Beveridge III* for the United States. *Edwin W. Johnson* and *John L. Carroll* for respondent. Reported below: 359 F. 2d 817.

No. 1175. HINCHCLIFF *v.* CLARKE, INTERNAL REVENUE AGENT, ET AL. C. A. 6th Cir. Certiorari denied. *William Patrick Clyne* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin, Joseph M. Howard* and *John M. Brant* for respondent United States. Reported below: 371 F. 2d 697.

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No. 1184. DOMANY ET AL. *v.* OTIS ELEVATOR CO. ET AL. C. A. 6th Cir. Certiorari denied. *Edward I. Stillman* for petitioners. *Sumner Canary* for Otis Elevator Co., and *Russell E. Leasure* for Sears, Roebuck & Co., respondents. Reported below: 369 F. 2d 604.

No. 1230. SCHAFITZ *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Certiorari denied. *Carl L. Shipley* for petitioner. *Solicitor General Marshall* and *Henry Geller* for respondent.

No. 1277. FERMIN *v.* UNITED STATES. Ct. Cl. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 1241. DUTTON, WARDEN *v.* MOSLEY. C. A. 5th Cir. Certiorari denied. *Arthur K. Bolton*, Attorney General of Georgia, and *G. Ernest Tidwell*, Executive Assistant Attorney General, for petitioner. Reported below: 367 F. 2d 913.

No. 1251. NATIONAL LABOR RELATIONS BOARD *v.* GARWIN CORP. ET AL.;

No. 1257. GARWIN CORP. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.; and

No. 1327. LOCAL 57, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *Lawrence M. Joseph* for petitioner in No. 1251 and for respondent in Nos. 1257 and 1327. *Guy Farmer* and *Joseph A. Perkins* for petitioners in No. 1257 and for respondents in No. 1251. *Morris P. Glushien* and *Max Zimny* for petitioner in No. 1327. Reported below: 126 U. S. App. D. C. 81, 374 F. 2d 295.

No. 1238. RUSH ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 370 F. 2d 520.

No. 1266. OREGON *v.* BREWTON. Sup. Ct. Ore. Certiorari denied. *George Van Hoomissen* and *Jacob B. Tanzer* for petitioner. Reported below: —— Ore. ——, 422 P. 2d 581.

No. 1271. SOMOLINOS *v.* HITT ET AL. Sup. Ct. P. R. Certiorari denied.

No. 1280. OERTLE ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Pat Malloy* for Oertle and *Robert S. Rizley* for McCague, petitioners. *Solicitor General Marshall, Assistant Attorney General Rogovin, Joseph M. Howard* and *John M. Brant* for the United States. Reported below: 370 F. 2d 719.

No. 1305. PAROUTIAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Robert J. Carluccio* for petitioner. *Acting Solicitor General Spritzer* for the United States. Reported below: 370 F. 2d 631.

No. 1283. SEAS SHIPPING CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *John Logan O'Donnell* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin, Harry Baum* and *Loring W. Post* for respondent. Reported below: 371 F. 2d 528.

No. 1298. HEIDRICH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *James L. Guilmartin* and *Stanley Jay Bartel* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin, Joseph M. Howard* and *Burton Berkley* for the United States. Reported below: 373 F. 2d 540.

No. 1282. ROMANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Abraham Glasser* and *Jerome Lewis* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 1303. CITY OF NEW ORLEANS ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. *Alvin J. Liska* for petitioners. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Harold C. Wilkenfeld* for the United States, and *Eugene D. Saunders* and *David J. Conroy* for Chrysler Corp., respondents. Reported below: 371 F. 2d 21.

No. 1304. IN RE BRAUER. Sup. Ct. N. J. Certiorari denied. *Abraham Glasser* for petitioner. *Arthur J. Sills*, Attorney General of New Jersey, and *Richard Newman*, Deputy Attorney General, for Supreme Court of New Jersey. Reported below: 48 N. J. 186, 225 A. 2d 1.

No. 1306. FENTON *v.* A/S GLITTRE ET AL. C. A. 2d Cir. Certiorari denied. *Jacob Rassner* for petitioner. *J. Ward O'Neill* for respondent A/S Glittre. Reported below: 370 F. 2d 146.

No. 1307. DALE BOAT YARDS, INC. *v.* SZUMSKI. Sup. Ct. N. J. Certiorari denied. *Edward B. Meredith* for petitioner. *Herman M. Wilson* for respondent. Reported below: 48 N. J. 401, 226 A. 2d 11.

No. 1370. GOLAY & CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari denied. *William E. Roberts* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent National Labor Relations Board. Reported below: 371 F. 2d 259.

No. 1309. REGINELLI *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 208 Pa. Super. 344, 222 A. 2d 605.

No. 1322. MCCAFFREY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *George J. Francis* and *Frances De Lost* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 372 F. 2d 482.

No. 1326. LUFTIG *v.* MCNAMARA, SECRETARY OF DEFENSE, ET AL. C. A. D. C. Cir. Certiorari denied. *Stanley Faulkner* and *Selma W. Samols* for petitioner. *Solicitor General Marshall* for respondents. Reported below: 126 U. S. App. D. C. 4, 373 F. 2d 664.

No. 1352. NORTHERN STATES POWER CO. ET AL. *v.* RURAL ELECTRIFICATION ADMINISTRATION ET AL. C. A. 8th Cir. Certiorari denied. *Kenneth W. Green* and *Joe A. Walters* for petitioners. *Solicitor General Marshall, Assistant Attorney General Sanders, Alan S. Rosenthal* and *Harvey L. Zuckman* for respondents. Reported below: 373 F. 2d 686.

No. 1305, Misc. SUAREZ *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz*, Attorney General of New York, for respondent. Reported below: 371 F. 2d 426.

No. 1278, Misc. BARNEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Marshall Tamor Golding* for the United States. Reported below: 371 F. 2d 166.

No. 1233, Misc. SHANE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 367 F. 2d 285.

No. 1267, Misc. MOCCIO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Robert M. de Poto* for petitioner. *William Cahn* for respondent. Reported below: 18 N. Y. 2d 839, 222 N. E. 2d 605.

No. 1347, Misc. YOUNG *v.* JUDICIAL CIRCUIT COURT OF MOBILE COUNTY. Sup. Ct. Ala. Certiorari denied. Petitioner *pro se*. *MacDonald Gallion*, Attorney General of Alabama, and *John C. Tyson III*, Assistant Attorney General, for respondent.

No. 1363, Misc. NARRO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *James R. Gillespie* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Marshall Tamor Golding* for the United States. Reported below: 370 F. 2d 329.

No. 1615, Misc. PHILLIPS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 1610, Misc. COX *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 411 S. W. 2d 320.

No. 1523, Misc. OSBORNE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Morris A. Shenker* and *Murry L. Randall* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Philip R. Monahan* for the United States. Reported below: 371 F. 2d 913.

No. 1501, Misc. FEE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 1516, Misc. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Brooks Taylor* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 367 F. 2d 144, 145.

No. 1528, Misc. WALSH *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Charles F. Choate* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 371 F. 2d 436.

No. 1542, Misc. TOWNES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 372 F. 2d 930.

No. 1547, Misc. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *S. Carter McMorris* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 372 F. 2d 478.

No. 1618, Misc. CARICO *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 418 P. 2d 702.

No. 1664, Misc. FERGANCHICK ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *William A. Dougherty* for petitioners. *Solicitor General Marshall* for the United States. Reported below: 374 F. 2d 559.

No. 1667, Misc. PRENDEZ *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 1628, Misc. HOWARD *v.* NORTON, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for respondents.

No. 1666, Misc. NOLEN *v.* WILSON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 372 F. 2d 15.

No. 1671, Misc. BROWN *v.* WILSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1688, Misc. DODD *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. Certiorari denied.

No. 1703, Misc. STILTNER *v.* RHAY, PENITENTIARY SUPERINTENDENT, ET AL. C. A. 9th Cir. Certiorari denied.

No. 1710, Misc. CHEADLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 370 F. 2d 314.

No. 1729, Misc. FLORES *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 374 F. 2d 225.

No. 1734, Misc. HERNANDEZ *v.* WILSON, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 1735, Misc. DEVOE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

Rehearing Denied.

No. 18. UTAH PIE CO. *v.* CONTINENTAL BAKING CO. ET AL., 386 U. S. 685. Petitions for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of these petitions.

No. 750. GRANELLO ET AL. *v.* UNITED STATES, 386 U. S. 1019. Petition for rehearing denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this petition.

No. 870. CURTIS ET AL. *v.* BOEGER, WARDEN, 386 U. S. 914, 978. Motion for leave to file second petition for rehearing denied.

No. 1488, Misc. LORENZANA *v.* PUERTO RICO, 386 U. S. 1040; and

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3. *Election of councilmen—Residence of candidates.*—An otherwise nondiscriminatory plan is not invalid because it uses boroughs merely as the basis of residence for candidates, not for voting or representation, since each councilman represents the city as a whole and not just the borough where he resides. Dusch v. Davis, p. 112.

III. Fourteenth Amendment.

Loss of citizenship.—The Fourteenth Amendment's provision that "All persons born or naturalized in the United States . . . are citizens of the United States . . ." completely controls the status of citizenship and prevents the cancellation of petitioner's citizenship. Afroyim v. Rusk, p. 253.

IV. Fourth Amendment.

1. *Searches of private dwellings—Housing inspectors.*—The Fourth Amendment bars prosecution of a person who has refused to permit a warrantless code-enforcement inspection of his personal residence. In this nonemergency situation appellant had a right to insist that the municipal inspectors obtain a search warrant. Camara v. Municipal Court, p. 523.

2. *Unconsented searches of commercial premises—Warrants.*—A suitable warrant procedure is required by the Fourth Amendment to effect unconsented administrative entry and inspection of private commercial premises. See v. City of Seattle, p. 541.

V. Search and Seizure.

"Mere evidence."—The distinction prohibiting seizure of items of only evidential value and allowing seizure of instrumentalities is no longer accepted as being required by the Fourth Amendment, as there is no rational distinction between a search for "mere evidence" and one for an "instrumentality" in terms of the privacy which is safeguarded by the Amendment, nor does the language of the Amendment itself make such a distinction. Warden v. Hayden, p. 294.

VI. Self-incrimination.

1. *Juvenile court proceedings — Admissions.* — The constitutional privilege against self-incrimination is applicable in the adjudicatory stage of juvenile proceedings and an admission by the juvenile may not be used against him in the absence of clear and unequivocal evidence that the admission was made with the knowledge that he was not obliged to speak and would not be penalized for remaining silent. In re Gault, p. 1.

CONSTITUTIONAL LAW—Continued.

2. *Seizure of clothing items—Evidence.*—The items of clothing seized during a warrantless search in hot pursuit of an armed felon are not "testimonial" or "communicative" and their introduction into evidence did not compel respondent to become a witness against himself in violation of the Fifth Amendment. Warden v. Hayden, p. 294.

VII. Sixth Amendment.

1. *Juvenile court proceedings—Confrontation and cross-examination.*—Absent a valid confession, a juvenile in the adjudicatory stage of juvenile court proceedings must be afforded the rights of confrontation and sworn testimony of witnesses available for cross-examination. In re Gault, p. 1.

2. *Juvenile court proceedings—Right to counsel.*—In the adjudicatory stage of juvenile proceedings the child and his parents must be advised of their right to be represented by counsel and, if they are unable to afford counsel, that counsel will be appointed to represent the child. In re Gault, p. 1.

CONTRACTS. See **Securities Act of 1933**, 1–2.

CORPORATE CONTROL. See **Administrative Procedure**, 2; **Interstate Commerce Commission**, 1.

COSMETICS. See **Judicial Review**, 2–4.

COST OF SERVICE. See **Interstate Commerce Commission**, 2–3.

COUNSEL. See **Constitutional Law**, I; VI, 1; VII; **Juvenile Delinquents.**

COUNTY CHARTERS. See **Jurisdiction**, 1.

COUNTY SCHOOL BOARDS. See **Constitutional Law**, II, 2; **Jurisdiction**, 2.

COURTS. See **Constitutional Law**, II, 2–3; **Jurisdiction**, 1–3; **Procedure**, 1; **Taxes**, 2.

CRIMINAL LAW. See **Constitutional Law**, I; IV–VII; **Juvenile Delinquents**; **Procedure**, 2; **Search and Seizure.**

CROSS-EXAMINATION. See **Constitutional Law**, I; VI, 1; VII; **Juvenile Delinquents.**

DECLARATORY JUDGMENT. See **Federal Food, Drug, and Cosmetic Act**; **Judicial Review**, 2–4.

DELINQUENCY. See **Constitutional Law**, I; VI, 1; VII; **Juvenile Delinquents.**

DEPORTATION. See **Immigration and Nationality Act of 1952.**

DILUENTS. See **Judicial Review**, 2.

DISCOUNTS. See **Federal Trade Commission; Judicial Review**, 1.

DISCRETION. See **Federal Trade Commission; Interstate Commerce Commission**, 2–3; **Judicial Review**, 1.

DISCRIMINATION. See **Constitutional Law**, II, 1.

DIVISION OF RATES. See **Interstate Commerce Commission**, 2–3.

DOING BUSINESS. See **Venue.**

DRUGS. See **Federal Food, Drug, and Cosmetic Act; Judicial Review**, 2–4.

DUE PROCESS. See **Constitutional Law**, I; VI, 1; VII; **Juvenile Delinquents.**

EAVESDROPPING. See **Procedure**, 2.

ELECTIONS. See **Constitutional Law**, II, 2–3; **Jurisdiction**, 1–2.

ELECTRONIC EAVESDROPPING. See **Procedure**, 2.

EMPLOYEES. See **Legislative Immunity.**

ENCOURAGEMENT OF DISCRIMINATION. See **Constitutional Law**, II, 1.

ENTRY. See **Constitutional Law**, IV.

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law**, III; **Jurisdiction**, 1–2.

ESTATE TAXES. See **Taxes**, 1–2.

EVIDENCE. See **Constitutional Law**, V; VI, 2; **Interstate Commerce Commission**, 2–3; **Procedure**, 1–2; **Search and Seizure.**

EXCLUSION. See **Immigration and Nationality Act of 1952.**

EXPERT DISCRETION. See **Interstate Commerce Commission**, 2–3.

FEDERAL FOOD, DRUG, AND COSMETIC ACT. See also **Judicial Review**, 2–4.

Prescription drugs—Proprietary names—Regulations for labeling and advertising.—Pre-enforcement review of regulations of the Commissioner of Food and Drugs concerning labeling and advertising of prescription drugs bearing proprietary names is not prohibited by the Act. Abbott Laboratories v. Gardner, p. 136.

FEDERAL POWER COMMISSION. See also **Administrative Procedure,** 1.

Hydroelectric projects—Federal development—Public interest.—Although the issue of federal development of water resources must, pursuant to § 7 (b) of the Federal Power Act, be evaluated by the FPC in connection with its consideration of the issuance of any license for a hydroelectric project, that issue has not been explored in the record herein; the determinative test is whether the project will be in the public interest, and that determination can be made only after an exploration of all relevant issues. Udall v. FPC, p. 428.

FEDERAL-STATE RELATIONS. See **Taxes,** 2.

FEDERAL TRADE COMMISSION. See also **Judicial Review,** 1.

Administrative procedure—Cease-and-desist order—Abuse of discretion.—Since the FTC's refusal to withhold enforcement of its cease-and-desist order in a price discrimination case did not constitute a patent abuse of discretion, the Court of Appeals exceeded its authority by setting aside the FTC's denial of a petition for a stay. FTC v. Universal-Rundle Corp., p. 244.

FEDERAL WATER POWER ACT. See **Administrative Procedure,** 1; **Federal Power Commission.**

FIFTH AMENDMENT. See **Constitutional Law,** I; V–VII; **Juvenile Delinquents; Search and Seizure.**

FINAL AGENCY ACTION. See **Federal Food, Drug, and Cosmetic Act; Judicial Review,** 2–4.

FIRE INSPECTIONS. See **Constitutional Law,** IV, 1–2.

FOREIGN ELECTIONS. See **Citizenship; Constitutional Law,** III.

FOURTEENTH AMENDMENT. See **Citizenship; Constitutional Law,** I–IV; VI, 2; VII; **Jurisdiction,** 1–2; **Juvenile Delinquents.**

FOURTH AMENDMENT. See **Constitutional Law,** IV–V; VI, 2; **Legislative Immunity; Search and Seizure.**

FRAUD. See **Procedure,** 2.

FREIGHT FORWARDERS. See **Interstate Commerce Commission,** 4–5.

GREYHOUND CORPORATION. See **Administrative Procedure,** 2; **Interstate Commerce Commission,** 1.

GROUP FINDINGS. See **Interstate Commerce Commission,** 2–3.

HAIR DYES. See **Judicial Review**, 2.

HEALTH INSPECTIONS. See **Constitutional Law**, IV.

HOMOSEXUALS. See **Immigration and Nationality Act of 1952.**

"HOT PURSUIT." See **Constitutional Law**, V; VI, 2; **Search and Seizure.**

HOUSING. See **Constitutional Law**, II, 1.

HOUSING CODES. See **Constitutional Law**, II, 1.

HYDROELECTRIC DAMS. See **Administrative Procedure**, 1; **Federal Power Commission.**

IMMIGRATION AND NATIONALITY ACT OF 1952.

Deportation of alien—Psychopathic personality—Homosexual.—Petitioner, an alien who at the time of his entry into this country was a homosexual, was excludable under § 212 (a) (4) of the Act as one "afflicted with [a] psychopathic personality," a term which Congress clearly intended to include homosexuals. Boutilier v. Immigration Service, p. 118.

IMMUNITY. See **Legislative Immunity.**

INFANTS. See **Constitutional Law**, I; VI, 1; VII; **Juvenile Delinquents.**

INITIATIVE AND REFERENDUM. See **Constitutional Law**, II, 1.

INSPECTIONS. See **Constitutional Law**, IV; **Judicial Review**, 3.

INSURANCE POLICIES. See **Securities Act of 1933**, 1–2.

INTERIOR DEPARTMENT. See **Administrative Procedure**, 1; **Federal Power Commission.**

INTERNAL REVENUE. See **Taxes**, 1.

INTERROGATORIES. See **Procedure**, 1.

INTERSTATE COMMERCE ACT. See **Administrative Procedure**, 2; **Interstate Commerce Commission**, 1.

INTERSTATE COMMERCE COMMISSION. See also **Administrative Procedure**, 2.

1. *Public interest—Corporate control—Anticompetitive issues.*—The ICC is required, as a general rule, under its duty to determine that the proposed transaction is in the "public interest" and for a "lawful object," to consider control and anticompetitive consequences before approving a stock issuance under § 20a (2) of the Interstate Commerce Act. Denver & R. G. W. R. Co. v. U. S., p. 485.

INTERSTATE COMMERCE COMMISSION—Continued.

2. *Railroad rate divisions—Group-basis evidence and findings.*—The ICC has authority to take evidence and make findings on a group basis, and in ratemaking or rate divisions cases involving large numbers of railroads the necessities of procedure and administration require proceeding on that basis. Chicago & N. W. R. Co. v. A., T. & S. F. R. Co., p. 326.

3. *Railroad rate divisions—Technical expertise—"Expert discretion."*—The ICC's "expert discretion" plays a considerable role in the technical area of railroad rate divisions and there was sufficient explanation for its exercise here. Chicago & N. W. R. Co. v. A., T. & S. F. R. Co., p. 326.

4. *Trailer-on-flatcar service—Availability to truckers.*—The ICC has authority to promulgate a rule requiring that any railroad offering TOFC service through its open-tariff publications must make that service available "to any person" on nondiscriminatory terms, and the ICC has power to authorize motor carriers to use TOFC service when it is offered by railroads to the public on open tariffs. American Trucking v. A., T. & S. F. R. Co., p. 397.

5. *Trailer-on-flatcar service — Bimodal service — Power to regulate.*—All TOFC ("piggyback") service is bimodal, and there is no basis for denying the ICC, in the absence of congressional direction, the power to regulate transportation that partakes of both elements. American Trucking v. A., T. & S. F. R. Co., p. 397.

INVESTMENT COMPANY ACT OF 1940. See **Securities Act of 1933**, 1–2.

INVESTMENT CONTRACTS. See **Securities Act of 1933**, 1–2.

JOINT RATES. See **Interstate Commerce Commission**, 2–3.

JUDGMENTS. See **Procedure**, 1.

JUDICIAL REVIEW. See also **Constitutional Law**, I; VI, 1; VII; **Federal Food, Drug, and Cosmetic Act; Federal Trade Commission; Juvenile Delinquents.**

1. *Administrative procedure—Federal Trade Commission—Abuse of discretion.*—Since the FTC's refusal to withhold enforcement of its cease-and-desist order in a price discrimination case did not constitute a patent abuse of discretion, the Court of Appeals exceeded its authority by setting aside the FTC's denial of a petition for a stay. FTC v. Universal-Rundle Corp., p. 244.

2. *Pre-enforcement review—Commissioner of Food and Drugs' regulations—Color additives.*—Under the standards set forth in *Abbott Laboratories* v. *Gardner, ante,* p. 136, namely, the appro-

JUDICIAL REVIEW—Continued.

priateness of the issues for judicial determination and the immediate severity of the regulations' impact on the respondents, the pre-enforcement challenge to these regulations is ripe for judicial review. Gardner v. Toilet Goods Assn., p. 167.

3. *Regulations—Commissioner of Food and Drugs—Pre-enforcement review.*—Pre-enforcement judicial review of the regulation involved here is not appropriate as the controversy is not ripe for adjudication under the standards set forth in *Abbott Laboratories* v. *Gardner, ante,* p. 136. Toilet Goods Assn. v. Gardner, p. 158.

4. *Statutory construction—Final agency action.*—Since the issue of statutory construction is purely legal, and the regulations of the Commissioner of Food and Drugs concerning the labeling and advertising of prescription drugs bearing proprietary names are final agency action under the Administrative Procedure Act, the case presents a controversy "ripe" for judicial resolution. Abbott Laboratories v. Gardner, p. 136.

JUDICIARY COMMITTEE. See **Legislative Immunity.**

JURIES. See **Procedure,** 1.

JURISDICTION. See also **Constitutional Law,** II, 2–3; **Federal Food, Drug, and Cosmetic Act; Judicial Review,** 1–4; **Venue.**

1. *Three-judge courts—State statutes.*—Three-judge courts were improperly convened under 28 U. S. C. § 2281 in these cases charging malapportionment since the "statutes" are of limited application; § 2281 does not apply to local ordinances or resolutions or operate against state officers who perform matters of purely local concern. Moody v. Flowers, p. 97; Dusch v. Davis, p. 112.

2. *Three-judge courts—Statewide statute.*—A three-judge court was properly convened since the challenged statute, concerning the manner in which Michigan county school boards are chosen, has general and statewide application. Sailors v. Board of Education, p. 105.

JUVENILE COURTS. See **Constitutional Law,** I; VI, 1; VII; **Juvenile Delinquents.**

JUVENILE DELINQUENTS. See also **Constitutional Law,** I; VI, 1; VII.

Juvenile courts—Due process.—In the adjudicatory stage of the juvenile process, where commitment to a state institution may follow, "it would be extraordinary if our Constitution did not require the procedural regularity and exercise of care implied in the phrase 'due process.'" In re Gault, p. 1.

LABELS. See **Federal Food, Drug, and Cosmetic Act; Judicial Review,** 4.

LABOR UNIONS. See **Venue.**

LEGISLATIVE EMPLOYEES. See **Legislative Immunity.**

LEGISLATIVE IMMUNITY.

Senate Judiciary Committee Chairman—Legislative employees.—While the doctrine of legislative immunity protects legislators engaged in the sphere of legitimate legislative activity, the doctrine is less absolute when applied to officers or employees of legislative bodies; and there is sufficient factual dispute with respect to the alleged participation by the Subcommittee's chief counsel in a claimed conspiracy illegally to seize petitioners' property and records to require that a trial be held. Dombrowski v. Eastland, p. 82.

LEWD TELEPHONE CALLS. See **Constitutional Law,** I; VI, 1; VII; **Juvenile Delinquents.**

LICENSES. See **Administrative Procedure,** 1; **Federal Power Commission.**

LOCAL GOVERNMENT. See **Constitutional Law,** II, 2–3; **Jurisdiction,** 1–2.

LOCAL OFFICIALS. See **Constitutional Law,** II, 2–3; **Jurisdiction,** 1–2.

LOSS OF CITIZENSHIP. See **Citizenship; Constitutional Law,** III.

LOUISIANA. See **Legislative Immunity.**

MALAPPORTIONMENT. See **Constitutional Law,** II, 2–3; **Jurisdiction,** 1–2.

MARITAL DEDUCTION. See **Taxes,** 1.

"MERE EVIDENCE." See **Constitutional Law,** V; VI, 2; **Search and Seizure.**

MICHIGAN. See **Constitutional Law,** II, 2; **Jurisdiction,** 2.

MOTOR CARRIERS. See **Interstate Commerce Commission,** 4–5.

MUNICIPALITY. See **Administrative Procedure,** 1; **Federal Power Commission.**

MUNICIPAL ORDINANCES. See **Constitutional Law,** IV.

MUTUAL FUNDS. See **Securities Act of 1933,** 1–2.

NATIONALITY ACT OF 1940. See **Citizenship; Constitutional Law,** III.

NATIONAL TRANSPORTATION POLICY. See **Interstate Commerce Commission**, 4–5.

NATURALIZATION. See **Citizenship; Constitutional Law**, III.

NEGLIGENCE. See **Procedure**, 1.

NEW TRIAL. See **Procedure**, 1.

NEW YORK. See **Jurisdiction**, 1.

NOTICE. See **Constitutional Law**, I; VI, 1; VII; **Juvenile Delinquents.**

OPEN HOUSING. See **Constitutional Law**, II, 1.

OPEN TARIFFS. See **Interstate Commerce Commission**, 4–5.

ORDINANCES. See **Constitutional Law**, IV.

PASSPORTS. See **Citizenship; Constitutional Law**, III.

"PIGGYBACK" SERVICE. See **Interstate Commerce Commission**, 4–5.

PLUMBING FIXTURES. See **Federal Trade Commission; Judicial Review**, 1.

POWER OF APPOINTMENT. See **Taxes**, 1.

POWER PROJECTS. See **Administrative Procedure**, 1; **Federal Power Commission.**

PRE-ENFORCEMENT REVIEW. See **Federal Food, Drug, and Cosmetic Act; Judicial Review**, 2–4.

PRESCRIPTION DRUGS. See **Federal Food, Drug, and Cosmetic Act; Judicial Review**, 4.

PRICE DISCRIMINATION. See **Federal Trade Commission; Judicial Review**, 1.

PRIVACY. See **Constitutional Law**, IV–V; VI, 2; **Search and Seizure.**

PRIVATE DWELLINGS. See **Constitutional Law**, IV, 1.

PRIVILEGE. See **Constitutional Law**, I; V–VII; **Juvenile Delinquents.**

PROBABLE CAUSE. See **Constitutional Law**, IV–V; VI, 2; **Search and Seizure.**

PROBATION OFFICERS. See **Constitutional Law**, I; VI, 1; VII; **Juvenile Delinquents.**

PROCEDURE. See also **Constitutional Law,** I; II, 2–3; VI, 1; VII; **Jurisdiction,** 1–2; **Juvenile Delinquents; Venue.**

1. *Court of Appeals—Special interrogatories to jury—New trial.*—Where jury in negligence suit failed to answer four of five interrogatories concerning different design aspects of a skip hoist, Court of Appeals erred in directing entry of judgment for respondent on ground evidence did not support finding of negligence on fifth aspect, and case should have been remanded to the trial judge who was in the best position to pass upon the question of a new trial. Iacurci v. Lummus Co., p. 86.

2. *Electronic eavesdropping—New trial.*—Since there was apparently no direct intrusion into attorney-client discussions, there is now no adequate justification to require a new trial. Case is remanded to the District Court for a hearing, findings and conclusions on the nature and relevance to all these convictions of the recorded conversations, and any other conversations that may be shown to have been similarly overheard. Hoffa v. United States, p. 231.

PROPERTY INTERESTS. See **Taxes,** 2.

PROPRIETARY NAMES. See **Federal Food, Drug, and Cosmetic Act; Judicial Review,** 4.

PSYCHOPATHIC PERSONALITY. See **Immigration and Nationality Act of 1952.**

PUBLIC INTEREST. See **Administrative Procedure,** 1–2; **Federal Power Commission; Interstate Commerce Commission,** 1.

PURE FOOD AND DRUGS. See **Federal Food, Drug, and Cosmetic Act; Judicial Review,** 2–4.

QUANTITY DISCOUNTS. See **Federal Trade Commission; Judicial Review,** 1.

RACIAL DISCRIMINATION. See **Constitutional Law,** II, 1.

RAILROADS. See **Administrative Procedure,** 2; **Interstate Commerce Commission,** 1–5.

RAILWAY EXPRESS AGENCY. See **Administrative Procedure,** 2; **Interstate Commerce Commission,** 1.

RAILWAY LABOR ACT. See **Venue.**

RATE DIVISIONS. See **Interstate Commerce Commission,** 2–3.

RATES OF RETURN. See **Taxes,** 1.

RECORDED CONVERSATIONS. See **Procedure,** 2.

RECREATIONAL FACILITIES. See **Administrative Procedure,** 1; **Federal Power Commission.**

REGULATIONS. See **Federal Food, Drug, and Cosmetic Act; Interstate Commerce Commission,** 4–5; **Judicial Review,** 2–4.

REMAND. See **Procedure,** 1–2.

RENUNCIATION. See **Citizenship; Constitutional Law,** III.

REPEAL. See **Constitutional Law,** II, 1.

RESIDENCE. See **Venue.**

RESIDENCE OF CANDIDATES. See **Constitutional Law,** II, 3; **Jurisdiction,** 1.

REVENUES. See **Interstate Commerce Commission,** 2–3.

REVIEW. See **Federal Food, Drug, and Cosmetic Act; Judicial Review,** 1–4.

RIGHT TO COUNSEL. See **Constitutional Law,** I; VI, 1; VII; **Juvenile Delinquents.**

ROBINSON-PATMAN ACT. See **Federal Trade Commission; Judicial Review,** 1.

SAN FRANCISCO. See **Constitutional Law,** IV, 1.

SCHOOL BOARDS. See **Constitutional Law,** II, 2; **Jurisdiction,** 2.

SEARCH AND SEIZURE. See also **Constitutional Law,** V; VI, 2; **Legislative Immunity.**

"Hot pursuit"—Warrantless search.—The "exigencies of the situation," in which the officers were in pursuit of a suspected armed felon in the house which he had entered only minutes before they arrived, permitted their warrantless entry and search. Warden v. Hayden, p. 294.

SEARCHES. See **Constitutional Law,** IV–V; VI, 2.

SEATTLE. See **Constitutional Law,** IV, 2.

SECRETARY OF HEALTH, EDUCATION, AND WELFARE. See **Federal Food, Drug, and Cosmetic Act; Judicial Review,** 2–4.

SECRETARY OF THE INTERIOR. See **Administrative Procedure,** 1; **Federal Power Commission.**

SECURITIES ACT OF 1933.

1. *Annuity contracts—Insurance policies—Assumption of investment risk.*—Respondent's "Flexible Fund" contract does not come within the insurance exemption of § 3 (a) of the Act since the appeal to the purchaser is not on the basis of stability and security but on the prospect of "growth" through investment management. Re-

SECURITIES ACT OF 1933—Continued.

spondent's assumption of an investment risk by its guarantee of cash value based on net premiums cannot by itself create an insurance provision under the federal definition. SEC v. United Benefit Life Ins. Co., p. 202.

2. *Insurance — Investment contract — Competition with mutual funds.*—The accumulation provisions of respondent's "Flexible Fund" contract constitute an investment contract under § 2 of the Act under the test that the terms of the offer shape the character of the instrument under the Act, the contract here being offered to purchasers in competition with mutual funds. SEC v. United Benefit Life Ins. Co., p. 202.

SECURITIES AND EXCHANGE COMMISSION. See **Securities Act of 1933**, 1–2.

SELF-INCRIMINATION. See **Constitutional Law**, I; V–VII; **Juvenile Delinquents**; **Search and Seizure.**

SENATE COMMITTEES. See **Legislative Immunity.**

SIXTH AMENDMENT. See **Constitutional Law**, I; VI, 1; VII; **Juvenile Delinquents.**

SKIP HOISTS. See **Procedure**, 1.

SNAKE RIVER. See **Administrative Procedure**, 1; **Federal Power Commission.**

SOLICITOR GENERAL. See **Procedure**, 2.

SPECIAL INTERROGATORIES. See **Procedure**, 1.

SPECIFIC PORTION. See **Taxes**, 1.

STATE ACTION. See **Constitutional Law**, II, 1.

STATE COURTS. See **Taxes**, 2.

STATE LAW. See **Taxes**, 2.

STATE STATUTES. See **Constitutional Law**, II, 2–3; **Jurisdiction**, 1–2.

STOCK ISSUANCE. See **Administrative Procedure**, 2; **Interstate Commerce Commission**, 1.

STRIKES. See **Venue.**

SUBCOMMITTEES. See **Legislative Immunity.**

SUITS. See **Venue.**

SUPPRESSION. See **Constitutional Law**, V; VI, 2; **Search and Seizure.**

SURVIVING SPOUSE. See **Taxes**, 1.

TARIFFS. See **Interstate Commerce Commission**, 2–5.

TAXES.

1. *Estate taxes—Marital deduction—Monthly stipend to widow.*—In the legislative history of the marital deduction there is no indication that Congress intended the deduction to be available only where the "specific portion" is expressed as a "fractional or percentile" share. The "specific portion" must be determined on the basis of the "amount of the corpus required to produce the fixed monthly stipend." Northeastern Nat. Bank v. U. S., p. 213.

2. *Federal estate taxes—Transfers of property—State law.*—Where federal estate tax liability turns upon the character of a property interest held and transferred by the decedent under state law, federal authorities are not bound by the determination made of such property interest by a state trial court; if there is no decision by the State's highest court federal authorities must apply what they find to be the state law after giving "proper regard" to relevant rulings of other courts of the State. Commissioner v. Estate of Bosch, p. 456.

TESTAMENTARY TRUSTS. See **Taxes**, 1.

THREE-JUDGE COURTS. See **Constitutional Law**, II, 2–3; **Jurisdiction**, 1–2.

THROUGH ROUTES. See **Interstate Commerce Commission**, 2–3.

TRAILER-ON-FLATCAR SERVICE. See **Interstate Commerce Commission**, 4–5.

TRANSFERS OF PROPERTY. See **Taxes**, 2.

TRANSPORTATION. See **Interstate Commerce Commission**, 2–5.

TREASURY REGULATIONS. See **Taxes**, 1–2.

TRIALS. See **Procedure**, 1–2.

TRUCKERS. See **Interstate Commerce Commission**, 4–5.

TRUST ESTATES. See **Taxes**, 1.

UNINCORPORATED ASSOCIATIONS. See **Venue.**

UNIONS. See **Venue.**

UNITED STATES CITIZEN. See **Citizenship**; **Constitutional Law**, III.

VARIABLE ANNUITIES. See **Securities Act of 1933**, 1–2.

VENUE.

Suit in federal court against unincorporated association—"Doing business."—Residence of an unincorporated association (which should be viewed as an entity for venue purposes) under the previous version of 28 U. S. C. § 1391 (b) refers to wherever it is "doing business"; and if the District Court now finds that respondent was not "doing business" in Colorado, the appropriateness of venue under the current version of § 1391 (*i. e.*, whether the claim "arose" in Colorado) should be considered. Denver & R. G. W. R. Co. v. Trainmen, p. 556.

VERDICTS. See **Procedure**, 1.

VIRGINIA. See **Constitutional Law**, II, 3; **Jurisdiction**, 1.

VOTING. See **Citizenship**; **Constitutional Law**, II, 2–3; III; **Jurisdiction**, 1–2.

WAIVERS. See **Constitutional Law**, I; VI, 1; VII; **Juvenile Delinquents.**

WARRANTS. See **Constitutional Law**, IV–V; VI, 2; **Search and Seizure.**

WATER POWER. See **Administrative Procedure**, 1; **Federal Power Commission.**

WILDLIFE CONSERVATION. See **Administrative Procedure**, 1; **Federal Power Commission.**

WITNESSES. See **Constitutional Law**, I; VI, 1; VII; **Juvenile Delinquents.**

WORDS.

1. *"Afflicted with [a] psychopathic personality."*—§ 212 (a)(4), Immigration and Nationality Act of 1952, 8 U. S. C. § 1182 (a)(4). Boutilier v. Immigration Service, p. 118.

2. *"Where all defendants reside."*—28 U. S. C. § 1391 (b). Denver & R. G. W. R. Co. v. Trainmen, p. 556.

WRONGFUL DEATH. See **Procedure**, 1.

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